U.S.
OCT 3 1980
MICHAEL RODAK, JR., CLERK

In The
Supreme Court
of the
United States

OCTOBER TERM, 1979

NO. 79-1260

Noel Chandler and Robert Granger,
Appellants,

vs.

State of Florida,
Appellee.

On Appeal from the Supreme Court of Florida

BRIEF OF APPELLANTS

JOEL HIRSCHHORN, P.A.
By Joel Hirschhorn, Esquire
742 Northwest 12th Avenue
Miami, Florida 33136
(305) 324-5320

Counsel for Appellants

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Constitutional Provisions	3
Statute Involved	3
Statement of the Case	4
Summary of Argument	9
Argument:	
I. The Sixth Amendment Guarantees *The Accused* the Right to a Public Trial	13
II. The Media's Right to Access to the Courtroom is No Greater Than the Public's Right, in General	18
III. The Mere Presence of Television and Still Photographic Cameras During a Criminal Trial Is Inherently Prejudicial and Detracts from Its Basic Purpose, Thus Denying the Defendant His Right to a Fair and Impartial Trial	24
A. *Estes v. Texas,* 381 U.S. 532, (1965) Revisited	25
B. Television is Different and Causes Witnesses and Jurors to Act, and React, Differently	27

TABLE OF CONTENTS (Continued)

Page

C. Continued Television Coverage of Trials Is Likely to Erode the "... fundamental conception of what a trial should be." *Estes, supra,* 381 U.S. at 580 (Mr. Chief Justice Warren Concurring) 32

D. There Is No Constitutional Basis to Justify Televising a Criminal Trial 34

IV. Permitting Electronic Media and Still Photographic Coverage During a Criminal Trial Over the Defendant's Objection, On Balance, Denies the Accused Due Process of Law Guaranteed By the Fourteenth Amendment 36

A. A Denial of Due Process of Law in Cases Involving the Publicity of Criminal Matters May Be Found Even Without an Affirmative Showing of Actual Prejudice 36

B. The Failure of the Florida Supreme Court to Conduct Scientifically Reliable and Constitutionally Valid Studies to Determine the Effects of Televising Criminal Trials Fatally Taints the Appellants' Convictions .. 41

C. The "In House" *Post Hoc* Office of The State Court Administration (OSCA) Commissioned and Relied upon by the Florida Supreme Court to Sustain the Experiment in Televising Criminal Trials is Constitutionally Deficient and "Scientifically" Unacceptable 46

TABLE OF CONTENTS (Continued)

Page

D. A Close Analysis of the Survey Establishes That There is a Constitutionally Significant Number of Witness and Juror Respondents Whose Acts, Conduct, Behavior, Self-Perception and Role in Televised Trials Were Affected by the Presence of Electronic and Still Photographic Equipment 52

E. Due Process of Law Compels Closing the Courtroom to the Camera's Eye 69

Conclusion 71

Appendix to Brief AB-1

TABLE OF CITATIONS

Cases:	Page
Alexander v. Louisiana, 405 U.S. 625 (1972)	58
Amsler v. United States, 381 F.2d 37 (9th Cir. 1967)	24
Bradley v. State of Texas, 470 F.2d 785 (5th Cir. 1973)	37
Branzburg v. Hayes, 408 U.S. 665 (1972)	20, 21
Bridges v. California, 314 U.S. 252 (1941)	19
Castaneda v. Partida, 430 U.S. 482 (1977)	58
Chandler v. State, 366 So.2d 64 (Fla.3d DCA 1979)	1
Chandler v. State, 376 So.2d 1157 (Fla. 1979)	1
Chapman v. California, 386 U.S. 18 (1967)	45
Coolidge v. New Hampshire, 403 U.S. 443 (1971)	33
Dieteman v. Time, Inc., 449 F.2d 245 (9th Cir. 1971)	35

TABLE OF CITATIONS (Continued)

Cases: **Page**

Dunaway v. New York,
U.S. , 99 S.Ct. 2248 (1979) 33

Estes v. Texas,
381 U.S. 532 (1965) 9, 10, 15, 18, 20, 21, 22, 23, 24, 25, 26, 27, 32, 34, 36, 37, 38, 39, 40, 62, 70

Faretta v. California,
422 U.S. 806 (1975) 14

Gagnon v. Scarpelli,
411 U.S. 778 (1967) 32

Gannett Publishing Co. v. De Pasquale,
U.S. , 99 S.Ct. 2898 (1979) 14, 20, 21, 22, 23, 24

Gannett Publishing Corp. v. Richardson,
580 P.2d 49 (Hawaii 1978) 23

Garrett v. Estelle,
556 F.2d 1274 (5th Cir. 1974), *cert. den.*, 438 U.S. 914 (1978) 24

Geise v. United States,
265 F.2d 659 (9th Cir.), *cert. den.*, 361 U.S. 842 (1959) 14

Gideon v. Wainwright,
372 U.S. 335 (1963) 70

TABLE OF CITATIONS

Cases: **Page**

Houchins v. KQED, Inc.,
438 U.S. 1 (1978) 21

Illinois v. Allen,
397 U.S. 337 (1970) 17

In re Griffiths,
413 U.S. 717 (1973) 3

In re: Murchison,
349 U.S. 133 (1955) 18, 40

In re Oliver,
333 U.S. 256 (1948) 16, 18

In re: Petition of Post-Newsweek Stations of Florida, Inc.,
Florida Supreme Court Case No. 46,835..... 43

Irvin v. Dowd,
366 U.S. 717 (1961) 27, 36

Mayer v. City of Chicago,
404 U.S. 189 (1971) 3

Miranda v. Arizona,
384 U.S. 436 (1966) 33

Moore v. City of East Cleveland, Ohio,
431 U.S. 494 (1977) 41

Nebraska Press Association v. Stuart,
427 U.S. 539 (1976) 15, 22, 23, 45

TABLE OF CITATIONS (Continued)

Cases: **Page**

Nixon v. Warner Communications, Inc.
435 U.S. 589 (1978) 20, 21, 22, 34, 35

Offutt v. United States,
348 U.S. 11 (1954) 40, 72

Pell v. Procunier,
417 U.S. 817 (1974) 20, 21, 22

Petition of Post-Newsweek Stations, Fla., Inc.,
327 So.2d 1 (Fla. 1976), *modified,* 337 So.2d 804 (Fla. 1976), *modified,* 347 So.2d 402 (Fla. 1977), *modified,* 347 So.2d 404 (Fla. 1977) 3

Petition of Post-Newsweek Stations of Florida, Inc.,
370 So.2d 764 (Fla. 1979) 9, 18, 32, 34, 42, 46, 48, 50, 53, 54, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

Rhodes v. State,
283 So.2d 351 (Fla. 1973) 72

Richmond Newspapers, Inc. v. Commonwealth of Virginia,
U.S.Sup.Ct. Case No. 79-243 ..... 15, 22

Rideau v. Louisiana,
373 U.S. 723 (1963) 23, 36, 70

Saxbe v. Washington Post,
417 U.S. 843 (1974) 20

TABLE OF CITATIONS (Continued)

Cases: **Page**

Sheppard v. Maxwell,
384 U.S. 333 (1965) 22, 23, 24, 36, 37, 40, 45, 70, 72

Shevin v. Sunbeam T.V. Corp.,
351 So.2d 723 (Fla. 1977), appeal dismissed, 435 U.S. 920 (1978) 35

Singer v. United States,
380 U.S. 24 (1965) 14

Stamicarbon, N.V. v. American Cyanamid Corporation,
506 F.2d 532 (2d Cir. 1974) 16

State v. Granger,
352 So.2d 175 (Fla. 1977) 5

State v. Jones,
Circuit Court, Eleventh Judicial Circuit, Dade County, Florida, Case No. 80-3039B 33

State v. Stiltner,
491 P.2d 1043 (Wash. 1971) 37

State v. Zamora,
Circuit Court, Eleventh Judicial Circuit, Dade County, Florida, Case No. 77-25123A 33, 62

Tribune Review Publishing Company v. Thomas,
153 F.Supp. 486 (W.D. Pa. 1957), aff'd, 254 F.2d 883 (1958) 17, 24, 35

TABLE OF CITATIONS (Continued)

Cases: **Page**

Trinidad v. Stettin,
U.S. District Ct., S.D. Fla., Case No. 79-1905-Civ-NCR 47

Trinidad v. Stettin,
United States Court of Appeals, 5th Circuit, Case No. 79-2555 47

Tumey v. State of Ohio,
273 U.S. 510 (1927) 18, 40

Turner v. Louisiana,
379 U.S. 866 (1965) 70

United States ex rel Bennett v. Rundle,
419 F.2d 599 (3d Cir. 1969) 16

United States v. Columbia Broadcasting System, Inc.,
497 F.2d 102 (5th Cir. 1974) 30

United States v. Kleinman,
107 F.Supp. 407 (D.C.D.C. 1952) 32

United States v. Williams,
568 F.2d 464 (5th Cir. 1978) 26

White v. Maryland,
373 U.S. 59 (1963) 70

Zemel v. Rusk,
381 U.S. 1 (1965) 21, 24

TABLE OF CITATIONS (Continued)

Page

Constitutional and Statutory Authorities:

United States Constitution —

First Amendment 10, 16, 18, 20, 21, 22, 34, 70

Sixth Amendment 2, 9, 10, 13, 14, 15, 16, 18, 20, 24, 35, 39, 68, 70

Fourteenth Amendment 2, 3, 12, 13, 21, 24, 25, 36, 38, 39, 70

Florida Constitution —
Article V, Section 2 (1972) 4

Pennsylvania Constitution —
Declaration of Rights IX (1776) 16

United States Code —

28 U.S.C. §1257(2) 2, 3

42 U.S.C. §1983 47

Florida Statutes Annotated —

F.S.A., Ch. 90 (1979) 46

32 F.S.A. Jud. Conduct Canon 3A(7) (Supp. 1978) . 3

32 F.S.A. Jud. Conduct Canon 3A(7) (Supp. Sept. 1979) 4

TABLE OF CITATIONS (Continued)

Page

Florida Rules —

Fla.R.Crim.P. 3.110 47

Fla.R.Crim.P. 3.190 24

Florida Code of Judicial Conduct —
Canon 3A(7) 2, 3, 4, 5, 9, 47, 50

Miscellaneous:

American Statesman News,
(Austin, Texas, Dec. 5, 1974) 15

1 *Annals of Congress,*
(1st Cong., Gales and Seeton, 1789) 15, 16

Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority,* 70 Psychological Monographs: General and Applied 1 (1955) 30

Baldus and Cole, *Statistical Proof of Discrimination* (1980) 58

51 *Cleveland Bar J.,* 172 (May, 1980) 26

Code of Ethics of the Society of Professional Journalists [Sigma Delta Chi] 26

2 *Cooley's Constitutional Limitation,*
931 (Carrington ed. 1927) 69

TABLE OF CITATIONS (Continued)

Page

1 Cox, *Reports of Cases in Criminal Law Argued and Determined in All the Courts in England and Ireland,* 519 (1846) 71

Davis, Strasser, Spitzer & Holt, *Changes in Group Members' Decision Preferences During Discussion: An Illustration With Mock Juries,* 34 Journal of Personality and Social Psychology 1177 (1976) 29

Deutsch and Gerard, *A Study of Normative and Informational Social Influences Upon Individual Judgment,* 51 Journal of Abnormal and Social Psychology 629 (1955) 28

Douglas, *The Public Trial and the Fair Press,* 33 Rocky Mt.L.Rev. 1 (1960) 40

Flango, *On the Difficulties of Studying Juries,* 63 Judicature 438 (April, 1980) 44

52 *Fla. Bar Journal,* 463 (1978) 19

Gannett News Services, May 21, 1980 [interview with George Gerbner] 51

Gerbner, *Trial by Television: Are We at the Point of No Return?* 63 Judicature 416 (1980) 36, 44

W. Gould and C. Gould, *Annotated Mother Goose* (New American Library, 1967) 36

TABLE OF CITATIONS (Continued)

Page

Comment, *Effects of Kinds of Questions and Atmosphere of Interrogation on Accuracy and Completeness of Testimony,* 84 Harv.L.Rev. 1620 (1971) 34

Hazard, *Securing Courtroom Decorum,* 80 Yale Law J. 433 (1970) 34

Kane, Parsons and Associates, Inc., *ABA Law Poll* (April, 1979) 31

Kennedy, *The Cult of the Robe: A Dissent,* 14 Fordham L.Rev. 192 (1945) 34

Kerlinger, *Foundations of Educational Research,* 382 (Holt, Rinehart and Winston, Inc. 1967) 44

H.B. Lee, *The Story of the Constitution,* 139 (1932) 16

Madge, *The Tools of Social Science,* 299 (Doubleday, 1965) 43

Magna Carta, Chapter 39 (1215) 16

Magruder and Claire, *The Constitution,* 273-274 (1933) 16

Mathews, *The American Constitutional System,* 346 (1932) 16

The Miami Herald, April 27, 1980, Section B, at 6, Col. 1 33

TABLE OF CITATIONS (Continued)

Page

Mouly, *Educational Research: The Art and Science of Investigation* (Allyn & Bacon, Inc., 1978) 47

Mouton, Blake & Olmstead, *The Relationship Between Frequency of Yielding and the Disclosure of Personal Identity,* 24 Journal of Personality 339 (1956) 28

The New Yorker Magazine, Sept. 3, 1979, at 58 19

The New York Times, April 23, 1980 19

Norton Critical Edition: Alice In Wonderland, 96 (Gray ed. 1971) 43

Pryor, Strawn, Buchanon & Meeske, *The Analysis of On-The-Scene Responses to Cameras in the Courtroom,* 45 Southern Speech Communication Journal 12 (Fall, 1979) 30, 31, 41, 42

Raven, *Social Influence on Opinions and the Communication of Related Content,* 58 Journal of Abnormal and Social Psychology 119 (1959) 28

Regan and Cheng, *Distraction and Attitude Change: A Resolution,* 9 Journal of Experimental Social Psychology 138 (1973) 28

"Report of the Florida Conference of Circuit Judges to the Florida Supreme Court," filed in *In re Post-Newsweek Stations of Florida, Inc.* (July 18, 1978).. 50, 51, 52

TABLE OF CITATIONS (Continued)

Page

"Rules Concerning Television, Radio and Photographic Coverage of Judicial Proceedings — Summary Table;" National Center for State Courts 18, 19

"Sample Survey Involving Electronic Media and Still Photography Coverage in Florida Courts Between July 5, 1977 and June 30, 1978;" Judicial Planning Coordination Unit, Office of the State Court Administration 43, 46, 47, 49, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

B. Schwartz, 1 *The Bill of Rights: A Documented History* 129 (1971) 16

Shakespeare, "As You Like It," Act II, Sc. vii, 139 ... 27, 28

West New Jersey Concessions, Chapter XXIII (1677 Colonial Charter) 16

6 J. Wigmore, *Evidence in Trials at Common Law,* §1834 at 438 (Chadbourne rev. 1976) 17

In The
Supreme Court
of the
United States

OCTOBER TERM, 1979

NO. 79-1260

Noel Chandler and Robert Granger,

Appellants,

vs.

State of Florida,

Appellee.

On Appeal from the Supreme Court of Florida

BRIEF OF APPELLANTS

OPINIONS BELOW

The opinion of the Florida Supreme Court (App. 3-4)[1] is reported at 376 So.2d 1157 (Fla. 1979). The opinion of the District Court of Appeal of Florida, Third District (App. 7-25) is reported at 366 So.2d 64 (Fla.3d DCA 1979).

JURISDICTION

The Florida Supreme Court denied Appellants' Petition for Rehearing on December 10, 1979 (App. 9-10). Appellants filed their Notice of Appeal on January 3, 1980 (App. 26). Appellants' Jurisdictional Statement was filed in this Court on February 14, 1980. The Court noted probable jurisdiction on April 21, 1980.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(2).

QUESTION PRESENTED

Whether Experimental (now permanent) Canon 3A(7) of the Code of Judicial Conduct of the State of Florida is violative of a defendant's rights to a fair and impartial trial, and to due process of law under the Sixth and Fourteenth Amendments to the Constitution of the United States as written or when applied to permit electronic and still photographic media coverage of a trial in progress over a defendant's objection.

---

[1]The following abbreviations will be used in this Brief: JS—Jurisdictional Statement; App—Appendix to Jurisdictional Statement; R—Original Record on Appeal; A—"Single" Appendix; AB—Appendix to Appellants' Brief.

CONSTITUTIONAL PROVISIONS

Amendment VI, to the Constitution of the United States, provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

Amendment XIV, to the Constitution of the United States, provides in pertinent part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law . . .

STATUTE INVOLVED[2]

32 F.S.A. Jud. Conduct Canon 3A(7) (Supp. 1978) was revised by the Florida Supreme Court to permit electronic media coverage of courtroom proceedings. The original Canon 3A(7), in pertinent part, provided:

> (7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto . . .

The Canon was revised to permit such coverage on an experimental basis in *Petition of Post-Newsweek Stations, Fla., Inc.*, 327 So.1 (Fla. 1976), *modified*, 337 So.2d 804 (Fla. 1976), *modified*, 347 So.2d 402 (Fla. 1977), *modified*, 347 So.2d 404 (Fla. 1977).

---

[2]The Canon in question is considered a statute, under 28 U.S.C. §1257(2), where the constitutionality of same has been upheld by the highest State Court. *See In re Griffiths*, 413 U.S. 717 (1973) and *Mayer v. City of Chicago*, 404 U.S. 189 (1971).

Subsequently, Canon 3A(7) was permanently amended to permit electronic media and still photographic coverage of courtroom proceedings, and now provides:

> Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure fair administration of justice in the pending cause, electronic media and still photography coverage of public, judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida.

32 F.S.A. Jud. Conduct Canon 3A(7) (Supp. Sept. 1979).

STATEMENT OF THE CASE

On July 5, 1977, Florida courts embarked on a one-year experimental program which authorized electronic media and still photographic coverage of all criminal (and civil) trials, while in progress, regardless of a defendant's objection to same. This rule was promulgated by the Florida Supreme Court pursuant to its general supervisory power under Article V, Section 2 of the Florida Constitution (1972), which authorizes that court to enact rules of procedure regulating the proceedings in all Florida courts.

Four days before the beginning of this "experimental" year, the Appellants, City of Miami Beach Police Officers at the time of their arrests, were charged by criminal information with conspiracy to commit a felony, burglary, grand larceny and possession of burglary tools arising out of the early morning, May 23rd, 1977, breaking into and entry of

Picciolos Restaurant, a well-known South Miami Beach dining spot (R. 1098-1101, J.S. 10). As detailed in the Jurisdictional Statement (J.S. 10-11), the unique facts and circumstances which led to Appellants' arrests, coupled with the popularity of the restaurant and the "breach" of trust by the two police officers made this case a "natural" for media to report, televise and publicize, during pretrial, trial and post-trial proceedings. Even the Assistant State Attorney prosecuting the trial termed this case "unusual" and "fascinating" during his opening statement to the jury (R. 206, 207). Earlier, the trial judge acknowledged the case presented "rather unique circumstances" (R. 42-43).

On July 21, 1977, Appellants filed their first motion seeking to have Florida's Experimental Rule 3A(7) declared unconstitutional as written and as applied (A. 3-4). The Trial Court declined to grant the requested relief, and instead "certified" the Rule's constitutionality to the Florida Supreme Court pursuant to the then-applicable provision of the Florida Appellate Rules (AB. 2). The Florida Supreme Court declined to rule on the "certified" question, dismissing same on the grounds that it was not "dispositive" of the criminal charges against Appellants (J.S. 11). *State v. Granger,* 352 So.2d 175 (Fla. 1977).

Thereafter, Appellants' case progressed on the trial docket. On October 25, 1977, Appellants renewed their motion challenging the constitutionality of the Experimental Rule (A. 5). This motion was denied by the trial court on the same day (A. 5-6) and by written order entered October 31, 1977 (AB. 4).

Prior to trial, on November 17, 1977, the Court conducted a hearing on Appellants' Motion to Suppress (R. 1129-1135) the tape recording of their conversations which had been intercepted by John Sion in a rather strange manner (App. 21). The tape was a critical item of evidence

linking the two police officers to the burglary of the restaurant (R. 1000). Fortuitously, the electronic media was not present (although newspaper reporters were) during the motion to suppress hearing at which Appellant Chandler testified and admitted using a "Walkie-Talkie" with co-defendant Granger, to "stage a bogus burglary" (R. 25-31, App. 21). The Trial Court denied the motion to suppress (R. 42-43, 1135).

Eighteen days later, Appellants' trial began in Dade County Circuit Court with the selection of the jury. Immediately prior to *voir dire,* Appellants made an *ore tenus* motion to remove the television camera and still photographer from the courtroom (A. 6-7). This was denied (A. 6). Similarly, an *ore tenus* motion to sequester the jury was made and denied (A. 6-7).

During jury selection, each member of the panel was questioned as to his or her ability to sit as a juror and to be "fair and impartial" despite the presence of a television camera during some, or all, of the proceedings (A. 12). All of the prospective jurors stated that they would not be "affected" in any way *(Id.),* although one juror at first said that she thought the presence of the television camera during the trial would lead her to believe ". . . there is something special about this case." (A. 9). Only two of the prospective jurors had ever been on television before (A. 10). A television camera was present during *voir dire* (A. 8). Following the selection and swearing of the jury, Appellants renewed their motion to sequester the jury because of the television coverage of the courtroom proceedings (A. 13). This was denied (A. 6, 13).

The Trial Court instructed the jury not to "watch, read or see" anything about the case on any of the media (A. 13). Just before the first night's recess, the Court advised the jury, "Perhaps it might be a good idea if you just avoid the local news and watch only the national news on television." (A. 13).

After the jury left for the evening, Appellants renewed their request that the witnesses be instructed by the court not to watch any television accounts of the testimony (A. 14). The trial court declined to do so on the grounds that the "problem" was an "interesting academic one, but of no practical purpose whatsoever." *(Id.)*, because the trial court concluded "no witnesses' testimony was reported or televised in any way" *(Id.)*.

The very next morning during direct examination of the State's "main" witness, John Sion, (the "ham" radio operator who had overheard and tape recorded the "burglary in progress"), the Trial Court was forced to interrupt the proceedings, discontinue the witness' testimony, remove the trial jury, and admonish the television cameraman from WPLG[3] who apparently was doing something with his television camera which the Judge found distracting (A. 15).

The television camera was in place the entire afternoon session during the State's presentation of evidence (A. 15-16). No television camera was present during any portion of the Appellants' presentation of evidence. Neither Appellant testified, at trial, although several defense witnesses were permitted to testify by the trial court (R. 657-919). Other defense witnesses were not permitted to testify, for reasons not relevant to the issue presented herein (R. 657-689).

At the conclusion of all the evidence, the Judge reminded the jury to "carefully abide by the instructions" given to them at the beginning of the trial and before each recess (A. 16).

---

[3]WPLG, Channel 10, Miami, Florida, is owned by Post-Newsweek Stations of Florida, Inc., which was the original proponent of the televised criminal trial rule.

The jury eventually convicted Appellants of all four charges against them (R. 1284-1291). The Trial Court immediately sentenced each of the Appellants to a total of seven years imprisonment to be followed by five years probation (App. 18). The Court then ordered that Appellants be taken into custody on the grounds that no Notice of Appeal had been filed, and they were, therefore, not entitled to bail pending appeal. The following day, Notice of Appeal having been filed, the Court set appeal bonds on both Appellants. Post-trial motions were first denied on the grounds that the Court lacked jurisdiction. Subsequently, on December 29, 1977, the District Court of Appeal temporarily relinquished jurisdiction to afford the Trial Court an opportunity to rule on the Appellants' post-trial motions (App. 18).

The Appellants' Motion for New Trial alleged, *inter alia*, that they had been denied a fair and impartial trial through no fault of their own (R. 1303). The Trial Court denied that motion without giving Appellants' counsel an opportunity to state specific grounds (R. 1096).

Thereafter, the Florida District Court of Appeal affirmed Appellants' convictions holding, with respect to the issue relevant here, that permitting the electronic media to televise portions of Appellants' trial over their objections did not deprive them of their constitutional rights to a fair trial, due process of law or an impartial jury, as written or applied (App. 19-20). The District Court based its decision on the assumption that the Florida Supreme Court, having decided to permit camera coverage of criminal trials, on an experimental basis, must have determined that such coverage did not violate the Federal and State Constitutions *(Id.)*. The District Court of Appeal did certify the constitutionality, *per se*, of the Experimental Canon to the Florida Supreme Court as "a question of great public interest" *(Id.)*.

Thereafter, the Florida Supreme Court denied the appeal holding that the District Court of Appeal "expressly declined to rule upon the constitutional issue," dismissed the petition for writ of certiorari on the grounds that "no conflict has been demonstrated," and determined that the certified question was rendered moot as a result of its decision in *Petition of Post-Newsweek Stations of Florida, Inc.*, 370 So.2d 764 (Fla. 1979) which was rendered *after* the District Court of Appeal's decision (App. 3-4). *Post-Newsweek, supra,* is the non-adversarial decision amending Canon 3A(7) which first experimentally, and now permanently, authorized television coverage of all trial and appellate proceedings in Florida courts, regardless of an objection by a participant or defendant.

Neither the Florida Supreme Court, nor the District Court of Appeal ever discussed *Estes v. Texas,* 381 U.S. 532 (1965), in their decisions affirming Appellants' convictions (App. 3-4, 7-25).

Appellants timely filed their Notice of Appeal to, and Jurisdictional Statement in, this Court. Mr. Justice Lewis F. Powell, Jr. granted Appellants' motion for a continuation of the stay of proceedings originally entered by the Florida Supreme Court (App. 32-33, 5-6), as a result of which Appellants are still at liberty on their respective appeal bonds.

SUMMARY OF ARGUMENT

I.

The Sixth Amendment guarantees the accused the right to a public trial. This right is personal to the accused. The media has no right greater than the general public's to attend criminal trials. While news reporters are entitled to access to the courtroom as a natural corollary of the public's "right to know," this "right of access" is not without its limitations.

Criminal trials were never intended to serve as an entertainment medium or as an educational "teaching" device. The press is not entitled to take advantage of the accused's "plight in the toils of the law." To permit electronic media to broadcast criminal trials in progress over a defendant's objection would deal a fatal blow to the historical meaning of the Sixth Amendment.

II.

The media's "right of access" to the courtroom, whether predicated on First or Sixth Amendment guarantees, is not superior to the public's right of access. This case does not present a "closure" attempt, but rather an effort by Appellants to keep the balance "nice and true" between the accused's right to a fair and impartial trial, and the media's right to gather news. Courts have the inherent power to prohibit broadcast media from televising pretrial or trial proceedings, and even to limit the public's access to courtrooms, where necessary, in order to prevent erosion of the right to a fair and impartial trial.

The First Amendment does not carry with it, the "unrestrained right to gather information."

III.

The mere presence of television and still photographic cameras during a criminal trial is inherently prejudicial and denies the accused his right to a fair and impartial trial. This Court has previously held that in "notorious" cases at least televising portions of pretrial and trial proceedings denied the defendant basic Constitutional rights, *Estes v. Texas*, 381 U.S. 532 (1956). The *Estes* Court could not agree on the sweep of the rule prohibiting televising trials in progress. This case, while not "notorious" is at least "more than routine," and therefore, offers the Court an opportunity to squarely face and deal with the constitutional question.

Television news gathering is different than other forms of media. The presence of the camera causes different, perhaps unidentifiable, reactions in jurors and witnesses. Socio-psychological studies support the conclusion that when people are distracted, their decision making abilities are altered. Similarly, when people involved in decision-making lose their anonymity, judgments are more likely to conform to socially acceptable opinions, rather than privately held views.

The mere presence of a television camera in the courtroom has a Constitutionally significant "inhibiting" effect upon witnesses, jurors and attorneys. As a result, the defendant's rights to effective assistance of counsel, to compel favorable witnesses, and to confront and cross-examine his accusers, are all impaired. The cost to individuals in terms of denial of due process of law far outweighs whatever benefit, if any, society derives from watching highly selected, frequently lurid glimpses of the judicial process.

Continued television coverage of criminal trials is likely to erode the public's perception of, and confidence in, our system of jurisprudence. The viewing public will hardly understand the terse granting of a televised motion to suppress on a mere "technicality" after it has seen the defendant admit the commission of the offense, (for "standing" purposes).

Commercial needs will compel even more competitive broadcasting of trials in the course of which, the public's perception of the scales of justice will be badly tarnished.

In short, there is no Constitutional basis to justify televising a criminal trial, especially when one considers the damage which will result to our basic freedoms.

IV.

Permitting electronic media and still-photographic coverage during a criminal trial over the defendant's objection denies the accused due process of law guaranteed by the Fourteenth Amendment. Such a constitutional deprivation may be found without an affirmative showing of actual prejudice. Pervasive pretrial publicity and the intrusion of news media into the trial process itself, frequently alters the constitutionally required judicial atmosphere so as to prevent the defendant from receiving a fair and impartial trial through no fault of his own. Where the presence of television cameras involves "such a probability that prejudice will result" due process of law considerations prevail. A "fair trial in a fair tribunal" is a basic requirement of due process of law. The mere presence of television cameras in a criminal proceeding destroys the ability of the accused to receive a fair and impartial trial as a matter of due process.

The Florida Supreme Court's failure to conduct scientifically reliable, and constitutionally valid studies prior to instituting the experimental year fatally taints Appellants' convictions. The Florida Supreme Court authorized the televising of criminal trials without first assuring itself that no one's individual liberties would be impaired. *Post hoc* studies conducted at the conclusion of the experimental year reflect a total failure on the part of the Court to properly test and measure the results of the experiment.

A careful analysis of the "In House" study conducted by the Florida Supreme Court at the conclusion of the experimental year clearly establishes that the conclusions drawn from the study are scientifically unsound and constitutionally deficient. In many cases the Florida Supreme Court overlooked critical data in attempting to

justify the experiment. The survey conducted by the administrative arm of the Florida Supreme Court, suffers from a significant lack of objectivity and serious departure from the "scientific" method.

A constitutionally significant number of witness and juror respondents to the survey established that their own acts, conduct, behavior, self-perception and roles in the televised criminal trials were affected by the presence of electronic and still-photographic media.

Due process of law compels the conclusion that the courtroom must be closed to the camera's eye. Where the State employs a procedure which produces a probability that prejudice will flow therefrom, this Court has not hesitated to strike down such procedures as "inherently lacking in due process of law." Even though one may not put his finger on the "specific mischief" caused by television, by its very nature, television causes prejudice to an accused contrary to his Sixth and Fourteenth Amendment rights.

I.

THE SIXTH AMENDMENT GUARANTEES THE ACCUSED THE RIGHT TO A PUBLIC TRIAL.

Denying Electronic Media and Still Photographic Coverage of Criminal Trials in Progress Will Not Offend the Sixth Amendment.

That the Sixth Amendment guarantees the accused the right to a public trial is beyond debate and discussion. The Constitution clearly states that it is the *accused's* right, not the public's. It is the defendant's sacred right, not that of the

press. In short, "the Sixth Amendment right to a public trial is a right of the accused, and of the accused only. . . ." *Geise v. United States,* 265 F.2d 659, 660 (9th Cir.), cert. denied, 361 U.S. 842 (1959).

This basic tenet of our criminal justice system was reaffirmed by this Court at its last term in *Gannett Co. v. De Pasquale,* U.S. , 99 S.Ct. 2898 (1979). There Mr. Justice Stewart, delivering the opinion for the Court stated:

> For these reasons, we hold that members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials. *Id.* at 2911.

Even the four members of this Court who could not join in Justice Stewart's opinion agreed that:

> By its literal terms the Sixth Amendment secures the right to a public trial only to "The Accused." *Id.* at 2924 (Mr. Justice Blackmun, concurring in part and dissenting in part).

Mr. Justice Blackmun's statement is, of course, consistent with his earlier opinion in *Faretta v. California,* 422 U.S. 806, 848 (1975), where he stated (while dissenting), "[T]he specific guarantees of the Sixth Amendment are personal to the accused."

On the other hand, it is clear that while ". . . a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial [citation omitted]. . . ." *Singer v. United States,* 380 U.S. 24, 35 (1965). *Sub judice* Appellants made no effort to obtain a "private" trial, but rather simply sought to preclude the presence of television cameras and still photographers from the courtroom while their trial was in

progress, consistent with the teachings of *Estes v. Texas,* 381 U.S. 532 (1965). No effort was made to impose a "gag" order, *cf. Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976); nor was any attempt made to exclude the public generally or to close the courtroom to print and/or electronic media reporters, *cf. Richmond Newspapers, Inc. v. Commonwealth of Virginia,* U.S.Sup.Ct. Case No. 79-243 (decision pending on jurisdiction and merits at present).

Members of the "Fourth Estate"[4] were welcome, only their television cameras and still-photographic equipment were sought to be barred. In short, Appellants sought to exercise their rights to a public trial without any effort to limit traditional methods of news-gathering in the courtroom.

The accused's right to a public trial is so deeply rooted in Colonial American History, that the founders of this nation and the draftsmen of our Constitution and the Bill of Rights hardly found it necessary to debate or discuss the reason for this aspect of the Sixth Amendment. Similarly, there is virtually no discussion of the *public* aspect of the right to trial in the Annals of Congress between 1789 and 1791. Colonial Congressional debate focused on venue and jury trial issues. In fact, the Sixth Amendment is virtually identical to James Madison's original proposal. 1 ANNALS OF CONG. 452 (1st Cong., Gales & Seeton, 1789). The House of Representatives

---

[4]The term, "Fourth Estate" is attributed to the prominent 18th Century British statesman and philosopher, Edmund Burke, who is reported to have called the reporters' gallery in Parliament a "Fourth Estate." The other three were the clergy, the nobility and the bourgeois. Mr. Justice Potter Stewart, in an address given at the Sesquicentennial Convocation, Yale Law School, on November 2, 1974 (as reported in the *American Statesman News,* (Austin, Tx.) Dec. 5, 1974, p. A-29) is reported to have explained the term as follows: "The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the government as an additional check on the three official branches."

approved Madison's public trial "Amendment" on August 22, 1789. *Id.* at 808. The Senate reports are very sketchy, but the Conference Committee report was accepted by the House on Sept. 24, 1789. *Id.* at 948.[5]

Clearly the purpose was to protect the accused from "Star Chamber" proceedings and to afford the defendant free access to the advice and counsel of not only his attorney, but also his family and friends. *See generally* Magruder and Claire, *The Constitution,* 273-274 (1933) and Mathews, *The American Constitutional System,* 346 (1932). "A public trial however, is not necessarily one to which everyone may be admitted, but it must be sufficiently open to all the friends of the accused and others to witness the proceedings if they desire." Lee, *The Story of the Constitution,* 139 (1932). Neither James Madison, the draftsmen of the Bill of Rights, the States which ratified the first ten amendments, nor this Court, ever contemplated that the accused's right to a public trial would somehow be twisted to provide unlimited access to courtrooms by the (broadcast) media under either the First or Sixth Amendments.

The accused's "trials and tribulations," the personal trauma (whether deserved or not) of being subjected to the adversary system, the need to defend one's self and even be subjected to cross-examination, were never intended to be

[5]The accused's right to a public trial was first included in the 1677 Colonial Charter known as the West New Jersey Concessions, Chapter XXIII. B. Schwartz, I. *The Bill of Rights: A Documented History,* 129 (1971). Schwartz traces this right to Chapter 39 of the Magna Carta (1215). Pennsylvania was the first state to actually guarantee the accused a public trial in its constitution, Pennsylvania, Constitution, Declaration of Rights IX (1776). *In re Oliver,* 333 U.S. 256, 266, n.15 (1948); *United States ex rel Bennett v. Rundle,* 419 F.2d 599, 605, n.21 (3d. Cir. 1969) and *Stamicarbon, N.V. v. American Cyanamid Corporation,* 506 F.2d 532, 539 (2d. Cir. 1974).

made public spectacles, nor should they be permitted to become a form of entertainment or educational shows. This Court ". . . must take cognizance of the fact that the constitutional right of the accused to a public trial is a privilege intended for his benefit. It does not entitle the press or the public to take advantage of [the accused's] involuntary exposure at the bar of justice to employ photographic means to picture his plight in the toils of the law either while in jail, going or coming from court, or while actually in the courtroom." *Tribune Review Publishing Company v. Thomas,* 153 F.Supp. 486, 495 (W.D.Pa. 1957), aff'd, 254 F.2d 883 (1958).

More recently, Mr. Justice Douglas observed in *Illinois v. Allen,* 397 U.S. 337, 351 (1970), that:

> A courtroom is a hallowed place where trial *must proceed with dignity and not become occasions for entertainment* by the participants, by extraneous persons, by *modern mass media, or otherwise.* [emphasis added].

To yield to the electronic media's request would be tantamount to abandoning two hundred years of adherence to the concept of the *accused's* right to a fair and impartial public trial.

Public trials serve a "vital societal function" in that they promote "strict conscientiousness in the performance of duty" by the court, the parties, witnesses and presumably jurors. *See* 6 J. Wigmore, *Evidence in Trials at Common Law,* §1834 at 438 (Chadbourne rev. 1976). Permitting television cameras and still photographic equipment will not add to that "vital societal function" and, as will be demonstrated in Point III, *infra,* may well detract from the performance of that function. Precluding television cameras from the courtroom will still enable the accused to exercise

his constitutional right to a public trial, and likewise permit all media to gather news on an equal basis. In this manner, the "public's right to know" what occurs in criminal trials, *see In re: Oliver,* 333 U.S. n.15 at 266-276, will be preserved as a matter of principle, and the defendant's Constitutional right to a public trial, free from prejudice or outside influence, *see In re: Murchison,* 349 U.S. 133 (1955); *Tumey v. State of Ohio,* 273 U.S. 510 (1927) and *Estes, supra,* 381 U.S. at 593, will remain absolute.

II.

THE MEDIA'S RIGHT TO ACCESS TO THE COURTROOM IS NO GREATER THAN THE PUBLIC'S RIGHT, IN GENERAL.

Neither the First Nor Sixth Amendments Compel the Presence of Broadcast Media in the Courtroom.

This is not a question involving First Amendment considerations. Appellants do not seek to preclude traditional methods of news coverage of trials in progress. The central issue is whether the electronic media's right to access to the courtroom is superior to the accused's right to a fair and impartial trial and to due process of law. While media proponents have sought to cloud the issue with First Amendment arguments, even the Florida Supreme Court, in its decision in *Post-Newsweek, supra,* 370 So.2d at 774, which engendered this litigation, rejected media's argument that the First and Sixth Amendments require entry of the electronic media into judicial proceedings.

Despite that conclusion, more than half of the states followed Florida's lead and "tinkered" with the hallowed trial process. According to the National Center for State Courts,

as of April 21, 1980, ten states have joined the "rush to electronic judgment" authorizing television, radio and still photographic coverage on a permanent basis (AB. 5-6). An additional sixteen states presently permit coverage on an "experimental" basis (AB. 7-9). and two states have enacted legislation which would appear to allow electronic media coverage (AB. 9). In sum, then, at present, at least twenty-eight states permit television coverage in one form or another.

The well financed and organized campaign by media to install television (yet another technological toy) in every courtroom in the United States has not, however, been without criticism from its own "brethren." The September 3, 1979 edition of *The New Yorker* magazine contained a rather caustic cartoon on the subject matter which "told" the entire story in a picture (AB. 10). Similarly, the April 23, 1980, edition of *The New York Times* published an article by George Gerbner, Dean of the University of Pennsylvania's Annenberg School of Communications, which suggested that television cameras do not belong in our courtrooms. The article's headline, "It's 11:30. And Heeeeere's Justice." says it all.

It clearly is a "trying task" to attempt to choose between free speech and fair trial, which are "two of the most cherished policies of our civilization." *Bridges v. California,* 314 U.S. 252, 260 (1941) (Mr. Justice Black). What is so incredible about the broadcast media's demands in America today is that no such request would ever be made in England, from whence our system of jurisprudence sprung. According to Harold Evans, editor of *The London Sunday Times,* "The idea of televising a trial [in England] ha[s] never been advocated by the boldest spirits in the press." 52 *Fla. Bar Journal,* 463 (1978).

There is little justification for a "running battle" between the courts and the press on this fair trial/free press

issue. Both are basic and sacred concepts in our system of government. This Court has endeavored mightily to preserve both and still "keep the peace" by placing emphasis on the Constitution and individual rights. This Court has had little difficulty in repeatedly holding (although admittedly by "split" votes) that members of the press do not have either a First or Sixth Amendment constitutionally guaranteed "right of access" greater than that afforded the public in general. *See, e.g., Pell v. Procunier,* 417 U.S. 817, 833 (1974); *Saxbe v. Washington Post,* 417 U.S. 843, 850 (1974); *Branzburg v. Hayes,* 408 U.S. 665 (1972); *Estes v. Texas,* 381 U.S. 532, 540 (1965); and *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 609-610 (1978). And, if that is so, how then can the broadcast media successfully claim a right of access superior to their own "brethren" in the printed media?[6] In fact, they cannot, for this Court has made it clear that the "right to access" to courtroom proceedings is not absolute. *Estes, supra,* and *Gannett Co., Inc., supra,* 99 S.Ct. at 2911. Moreover, as Mr. Justice Rehnquist pointed out in his concurring opinion in *Gannett,* at 2918:

> Despite the Court's seeming reservation of the question whether the First Amendment guarantees the public a right of access to pretrial proceedings, it is clear that this Court repeatedly has held that there is no First Amendment right of access in the public or the press to judicial or other governmental proceedings. See *post,* at 2921-2922; *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 609, 98 S.Ct. 1306, 1317, 55 L.Ed.2d 570 (1978); *Saxbe v. Washington Post Co.,* 417 U.S. 843, 850, 94 S.Ct. 2811, 2815, 41 L.Ed.2d 514 (1974); *Pell v. Procunier,*

[6]In *Estes* the Court answered that very question: "It is said, however, that the freedoms granted in the First Amendment extend a right to the news media to televise from the courtroom, and that to refuse to honor this privilege is to discriminate between the newspapers and television. *This is a misconception of the rights of the press.*" 381 U.S. at 539. [emphasis added].

417 U.S. 817, 834, 94 S.Ct. 2800, 2810, 41 L.Ed.2d 495 (1974); *Branzburg v. Hayes,* 408 U.S. 665, 684-685, 92 S.Ct. 2646, 2658-2659, 33 L.Ed.2d 626 (1972); *Zemel v. Rusk,* 381 U.S. 1, 16-17, 85 S.Ct. 1271, 1280-1281, 14 L.Ed.2d 179 (1965); *Estes v. Texas,* 381 U.S. 532, 539-540, 85 S.Ct. 1628, 1631-1632, 14 L.Ed.2d 543 (1965). See also *Houchins v. KQED, Inc.,* 438 U.S. 1, 9-15, 98 S.Ct. 2588, 2594-2597, 57 L.Ed.2d 553 (1978) (opinions of BURGER, C. J., WHITE and REHNQUIST, JJ.); *id.,* at 2908 (STEWART, J., concurring). "The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors." *Ibid.* Thus, this Court emphatically has rejected the proposition advanced in Mr. Justice POWELL's concurring opinion, *ante,* at 2914, that the First Amendment is some sort of Constitutional "sunshine law" that requires notice, an opportunity to be heard and substantial reasons before a governmental proceeding may be closed to the public and press.

Mr. Justice Blackmun, (with whom Justices Brennan, White and Marshall joined) also observed in *Gannett, supra,* at 2922:

> Despite Mr. Justice POWELL's concern, *ante, this Court heretofore has not found and does not today find, any First Amendment right of access to judicial or other governmental proceedings.* See, *e.g., Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 608-610, 98 S.Ct. 1306, 1317-1318, 55 L.Ed.2d 570 (1978); *Pell v. Procunier,* 417 U.S. 817,

834, 94 S.Ct. 2800, 2810, 41 L.Ed.2d 495 (1974). [emphasis added].

Moreover, a careful reading of *Gannett* makes it clear that Mr. Justice Stewart's opinion for the Court concluded "that the Constitution provides no such [First Amendment] right [of access], greater than the public's right in general." 99 S.Ct. at 2913.

Thus, the invitation to expand the First Amendment, issued to this Court by *Richmond Newspapers, Inc.*, in its Brief on the Merits at pp. 27-43, ought to be declined, despite the apparently harsh closure facts presented in *Richmond Newspapers, Inc. v. Commonwealth of Virginia, supra.*

In any event, the question of "First Amendment access" is academic *sub judice,* because there was no closure order sought. The Appellants merely sought to preclude the presence of tape recorders, television cameras and still photographers from the courtroom. No effort was made to exclude either the general public or news reporters from either print or broadcast media. *See Nixon v. Warner Communications, Inc., supra,* 435 U.S. at 609-610. Appellants did not seek to interfere with the broadcast media's reporters' rights to listen to, gather and write down "events that transpire[d] in the courtroom." *Sheppard v. Maxwell,* 384 U.S. 333, 362-363 (1965). Hence, *Nebraska Press Association v. Stuart, supra,* "gag" order principles do not come into play *sub judice.*

Appellants further contend that Courts have the inherent supervisory power to prohibit broadcast media from televising pretrial or trial proceedings where necessary to prevent interference with a defendant's rights to a fair and impartial trial, consistent with the teachings of *Estes v. Texas, supra,* and *Sheppard v. Maxwell, supra.* While, fortuitously, there was no broadcast media coverage of

Appellant Chandler's testimony during the Motion to Suppress hearing, the trial court certainly had the authority and could have closed the courtroom to prospective jurors to prevent them from being "prejudiced" or "tainted" by observing the accused admit, (for the purpose of the Motion to Suppress), the very acts, words, or deeds which, at trial, the State would be required to prove beyond and to the exclusion of every reasonable doubt (under the Florida standard) without the benefit of compelling the defendant's testimony. *See Rideau v. Louisiana,* 373 U.S. 723 (1963); *Estes v. Texas, supra; Sheppard v. Maxwell, supra;* and *Gannett Publishing Co., Inc. v. DePasqual, supra. See also Gannett Publishing Corp. v. Richardson,* 580 P.2d 49, 55 (Hawaii 1978).

Frequently media representatives, in their zeal to perform their professional responsibilities, overlook the "necessities" and "realities" of the criminal justice system. Rarely, if ever, has the press been concerned with whether its (even accurate) reporting of a matter might prejudice a defendant's rights to receive a fair and impartial trial. Mr. Chief Justice Burger's observation in *Nebraska Press Association v. Stuart, supra,* is most telling on this point:

> It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors. 427 U.S. at 561.

How will the television stations' broadcast on the evening news, (reported in living color and live action), of the defendant's admission to the crime (during the Motion to Suppress hearing) "protect the rights of the accused to a fair trial by unbiased jurors," when the following morning the trial judge *denies* the Motion to Suppress and jury selection is commenced? This is a very real problem in Florida, for

example, where the accused has the right to file a Motion to Suppress at any time right up to, and including, the day of the commencement of the trial. Fla.R.Crim.P. 3.190.

Similarly, trial courts should have the inherent supervisory power to prevent members of the public in general from bringing into the courtroom their own noiseless 35mm still cameras and the now-so-readily-available portable video tape recorders and sound cameras which operate on batteries, do not require any special lighting and even have "slow motion" and "instant replay" features. *See Gannett Co., Inc. v. DePasqual, supra,* 99 S.Ct. at 2936 (Mr. Justice Blackmun concurring in part and dissenting in part); *Estes v. Texas, supra; Sheppard v. Maxwell, supra; Amsler v. United States,* 381 F.2d 37, 53 (9th Cir. 1967); and *Tribune Review Publishing Company v. Thomas, supra,* 153 F.Supp. at 494.

Finally, Appellants respectfully remind this Court that "The right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk,* 381 U.S. 1 (1965). The broadcast media which asks this Court to ignore the accused's Sixth and Fourteenth Amendment rights and to overrule *Estes, supra, Sheppard, supra* and *Gannett, supra,* is the same "Fourth Estate" which unsuccessfully sought a court order authorizing the recording, for home television viewing, of anticipated executions at the Texas State Prison. *Garrett v. Estelle,* 556 F.2d 1274 (5th Cir. 1974), cert. den., 4380, 5914 (1978). One can only wonder what lofty First Amendment goal was sought to be promoted by such a macabre request.

III.

THE MERE PRESENCE OF TELEVISION AND STILL PHOTOGRAPHIC CAMERAS DURING A CRIMINAL TRIAL, OVER A DEFENDANT'S

OBJECTION, IS INHERENTLY PREJUDICIAL AND DETRACTS FROM ITS BASIC PURPOSE, THUS DENYING THE ACCUSED HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL.

A. *Estes v. Texas*, 381 U.S. 532 (1965), Revisited.

As Mr. Justice Harlan succinctly observed in his concurring opinion in *Estes v. Texas, supra,* 381 U.S. at 587:

> The constitutional issue presented by this case is far-reaching in its implications for the administration of justice in this country. The precise question is whether the Fourteenth Amendment prohibits a State, over the objection of a defendant, from employing television in the courtroom to televise contemporaneously, or subsequently by means of videotape, the courtroom proceedings of a criminal trial of widespread public interest. The issue is no narrower than this because petitioner has not asserted any isolatable prejudice resulting from the presence of television apparatus within the courtroom or from the contemporaneous or subsequent broadcasting of the trial proceedings.

Appellants were not as "notorious" as Billie Sol Estes, yet neither was the trial ". . . of a more or less routine nature." *Id.*

Thus, the decision in this case will fill the hiatus left in this area by the various separate opinions of the *Estes* court. While neither "fish nor fowl," Appellants are still entitled to the guarantee that their liberty ". . . should not be put in jeopardy because of actions of any news media." *Estes, supra,* 381 U.S. at 540 (Mr. Justice Clark quoting the *amici curiae* brief of the National Association of Broadcasters and the Radio Television News Directors Association).

The purpose of public trials is to protect the accused, not to entertain or even to educate. "Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial." *Id.* The televising of criminal trials does not contribute to, or otherwise promote, that lofty end. The Constitution and the Bill of Rights have survived, not because of "majority" rule, but because this Court has been ever vigilant to promote and protect the rights of the unpopular, the oppressed and the minority. "Any attempt to find an answer to the question of what effect do cameras in the courtroom have on the administration of justice which is based on what a majority thinks [see Point IV-D, *infra*], is way wide of the mark."[7]

The solution to the Constitutional dilemma is compounded by the "news media's penchant for extensively covering sensational trials." *United States v. Williams,* 568 F.2d 464, 467 (5th Cir. 1978). This has produced the "so-called 'media circus' cases," *Id.*, despite the "fair play" section of the Code of Ethics of the Society of Professional Journalists [Sigma Delta Chi], which requires "Journalists at all times [to] show respect for the dignity, privacy, rights and well-being of people encountered in the course of gathering and presenting news." Furthermore, the Sigma Delta Chi Code states, "The media should not pander to morbid curiosity about the details of vice and crime." The answer, of course, is found in the "Responsibility" section of the Sigma Delta Chi Code: "The public's right to know of events of public importance is the overriding mission of the mass media." And, the "Ethics" section of the Code makes it poignently clear, "Journalists must be free of obligation to any interest other than the public's right to know."

---

[7]Report and Recommendations of the *Ad Hoc* Committee of the Bar Association of Greater Cleveland, on the Effect of Cameras in the Courtroom on the Participants in Such a Trial, 51 Cleveland Bar J., 172, 174 (May, 1980).

It is, therefore, understandable, though regretable, that "not a term passes without this Court being importuned to review a conviction had in States throughout the country where substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts. . . ." *Irvin v. Dowd,* 366 U.S. 717, 730 (1961) (Mr. Justice Frankfurter concurring). Now, this Court will be treated to a never-ending parade of "three-ring circuses" arising out of the experiment in "live broadcast justice." It is already clear that jurors, being fallible, have a difficult enough time attempting to ". . . reach a disinterested verdict based exclusively on what [is] heard in the Court, when, before they [enter] the jury box, their minds [have been] saturated by press and radio for months preceding by matter designed to establish the guilt of the accused." *Irvin, supra,* 366 U.S. at 729-730. With the continuation of televised criminal trials, the "mischief" presaged by Mr. Chief Justice Warren in his concurring opinion in *Estes, supra,* 381 U.S. 552-586, will fall upon our system of jurisprudence like the Ten Plagues on the House of Egypt.

The broadcast media now has the ability to determine which criminal cases shall become "notorious," which ones shall present a *"cause célèbre," Estes, supra,* 381 U.S. at 545, simply by setting up a tripod in the Courtroom. Appellants' case, while not "run-of-the-mill," was not notorious. Appellants' case presents this Court with the clear opportunity to "draw the line" finally and firmly, to close the doors to the "snouts," *Id.* at 568, of the "zoom" lens, *Id.* at 578.

B. Television is Different and Causes Witnesses and Jurors to Act, and React, Differently.

As Jaques said:

All the world's a stage,
And all the men and women merely players:
They have their exits and their entrances;
And one man in his time plays many parts. . . .

Shakespeare, "As You Like It," Act II, Sc. vii, 139.

Whether the juror will be distracted, influenced, inhibited, intimidated or unaffected by the presence of television cameras during the trial will never be known "beyond and to the exclusion of every reasonable doubt." What is known, however, are the following facts:

1. Most people have difficulty doing an important task or trying to understand complex messages while being subconsciously distracted by music.[8]

2. When people lose their anonymity, they are more likely to surrender their own personal convictions for a more socially acceptable opinion.[9]

That is to say there is increased pressure to "conform" when the jury loses its anonymity. Why are jurors required to deliberate in secret? Why are lawyers and parties generally prohibited from interviewing jurors post-verdict unless leave of Court is given? Because, there is a time-honored tradition of the sanctity of the jury's deliberations and verdict. Public broadcasting of the members of the jury, and highly edited, sensationalized portions of the trial will adversely affect the jurors' role.[10]

---

[8]Regan and Cheng, *Distraction and Attitude Change: A Resolution*, 9 Journal of Experimental Social Psychology 138 (1973).

[9]Mouton, Blake & Olmstead, *The Relationship Between Frequency of Yielding and the Disclosure of Personal Identity*, 24 Journal of Personality 339 (1956).

[10]See, Raven, *Social Influence on Opinions and the Communication of Related Content*, 58 Journal of Abnormal and Social Psychology, 119 (1959); *See also* Deutsch & Gerard, *A Study of Normative and Informational Social Influences Upon Individual Judgment*, 51 Journal of Abnormal and Social Psychology, 629 (1955).

The more public a trial is, the more jurors will tend to distort the content of the trial and change their opinions in the direction of the group or community norm, even if the jurors' individual opinions are to remain anonymous. For example, picture the situation of a "liberal" juror living in a "conservative" community. Making the trial more public (which would have the effect of identifying the jurors with the verdict visually and publicly) might cause the "liberal" juror to conform to the "conservative" community opinion. A conviction might well be obtained if the trial was televised, whereas if the trial was kept more private, the jurors more anonymous, the liberal juror might just stick to his private opinion, the result being a "hung" jury, or possibly, ultimately, an acquittal.

This is not to suggest, of course, that jurors are not, or should not, be accountable to the community. They are, as is the system itself. However, inherent to our system is the concept of "jury pardon" and even "irrational" or "illogical" verdicts. While our present system of criminal justice may not be perfect, it is certainly far better than that which has previously been known to man.

> 3. Nonanonymous groups have far more difficulty making decisions than anonymous groups. In an interesting and unique study, "mock" juries were informed that they would be publicly examined, after their verdict. Those "nonanonymous" juries exhibited considerably different patterns of change in opinion than did the mock juries who were told that deliberations would remain private.[11]

[11]Davis, Strasser, Spitzer & Holt, *Changes in Group Members' Decision Preferences During Discussion: An Illustration With Mock Juries*, 34 Journal of Personality and Social Psychology 1177 (1976). But *see*, Point IV-D *infra*, which points out the difficulties of accurate measurement based on "mock" juries.

4. Finally, in a now classical series of studies by the prominent social psychologist, Dr. Solomon E. Asch, it is clear that "social forces" can easily induce subjects to "surrender" their own private convictions for the sake of conformity and to avoid public ostracism.[12]

Obviously, since jurors arrive at decisions based on observations of the witnesses, the quality of testimony and other factors, where a witness is affected by the presence of broadcast media (*See* Point IV-D, *infra*), there will be a spill-over effect. *See United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 102, 105 (5th Cir. 1974). (Unique prejudicial impact of being telecast.)

According to one study,[13] the respondent participants in trials televised in Florida during the experimental year,

> . . . were puzzled as to whether cameras affected witness behavior. While slightly over one in five respondents felt television and still cameras inhibited witness testimony, over one in four reported uncertainty about this issue.
>
> Since jurors rely upon testimony by witnesses to help reach a decision, it is particularly intriguing to examine juror perceptions of how cameras affect such testimony. Our subsample of 45 jurors who had experienced television cameras and 51 who had served in trials covered by still cameras responded similarly to the other respondents. About one in six

[12]Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 Psychological Monographs: General and Applied 1 (1955).

[13]Pryor, Strawn, Buchanon & Meeske, *The Analysis of On-The-Scene Responses to Cameras in the Courtroom*, 45 Southern Speech Communication Journal, 12, 22 (Fall, 1979).

believed that television cameras inhibit testimony while one in five found still cameras inhibiting.

In addition, a large number of jurors, almost one-third, were uncertain about TV and still camera effects on testimony. Of the witnesses who responded to this item, two of nine believed that television cameras inhibited testimony, while none of five reported adverse effects of still cameras.

In light of those findings, developed by a team of three University of Central Florida academicians and a former State of Florida Trial Judge (who is now an active trial attorney), Appellants cannot understand why the Attorney General of the State of Florida would continue to press for affirmance of a Rule of Court which had the effect of seriously "inhibiting" witness testimony.[14]

Recently the American Bar Association retained a prestigious New York public opinion research firm to conduct a random cross-section public opinion pole focusing on various news media-court issues. Sixty-eight percent of the attorneys sampled, on a national basis, opposed cameras in the courtroom. Kane, Parsons and Associates, Inc., *ABA LawPoll,* at pg. 39 (April, 1979). Seventy-five percent of the respondent attorneys "agreed that television would distract witnesses." *Id.* at 43. Only thirty-seven percent thought that televising courtroom proceedings would "enhance the public concept of our system of justice." *Id.* at pg. 45.

[14]It is a well-known fact which needs no citation that most victims and third-party witnesses are "unhappy" about being "involved" to begin with. Many, many state prosecutions are lost or dropped, because of witness reluctance to "come to court." Now the State of Florida offers these unwilling and disinclined people the opportunity to be harassed, embarrassed, inhibited, distracted, and televised on the evening news, in addition to the normal rigors of direct and cross-examination.

Additional problems of Constitutional dimension are raised by the presence of broadcast media during a trial over a defendant's objection:

> 1. The accused's right to effective assistance of counsel may be impaired;
>
> 2. The defendant's right to compel favorable witnesses to testify in his own behalf may be rendered meaningless, where, for example, the witness refuses to come forward, electing to face a contempt of court citation, rather than being forced to testify on "stage," *cf. United States v. Kleinman,* 107 F.Supp. 407 (D.C.D.C. 1952);
>
> 3. Witness *and juror* sequestration will have to be imposed in every case which is broadcast, "human nature being what it is" to assure the defendant of a fair and impartial trial free from "outside influences." And, of course, due process of law cannot be measured in terms of dollars and cents. *See Gagnon v. Scarpelli,* 411 U.S. 778, 788 (1967).

C. Continued Television Coverage of Trials Is Likely to Erode the ". . . Fundamental Conception of What a Trial Should Be." *Estes, supra,* 381 U.S. at 580 (Mr. Chief Justice Warren Concurring).

The public's perception of justice is an important element in maintaining respect for, and decorum in, our courts. While ". . . public knowledge and understanding of the judicial process [may be] at a low ebb [in Florida]," *Post-Newsweek, supra,* 370 So.2d 764, that is hardly sufficient justification for the rule in question. Moreover, it is extremely unlikely that the public gained any significant knowledge or

better understanding of, and more respect for, the traditional system as a result of the media's broadcasting of the *Zamora,*[15] *Bundy,*[16] *Jones*[17] or *McDuffie*[18] debacles.

Do we really expect the viewing public to truly understand the trial court's granting the defendant's Motion to Suppress on the grounds of a *Miranda,*[19] *Collidge,*[20] or *Dunaway*[21] violation? Especially, when the television camera

---

[15]*See* Part IV-D, *infra,* at n.33.

[16]The now infamous Theodore J. Bundy was made a national television star. The broadcast media did for Bundy what he could not do for himself. A law school dropout, now twice convicted of murder and sentenced to the electric chair, Bundy acted as his own attorney in the presence of national television coverage.

[17]The case of *State of Florida v. Johnny Jones,* tried recently in Dade County, Florida is another prime example of media excess. Dr. Jones, a prominent Black leader in the Miami community, who was also the Superintendent of the Dade County, Florida School System, was tried and convicted (in the press first) of grand theft under the daily glare of special television lighting (AB. 16-18). The *Jones* trial, broadcast every evening by PBS from "gavel-to-gavel" produced several rather unusual events. In addition to the lighting problem, for example, the trial judge, concerned with the public's view of the prosecutor and defense attorneys' vociferous verbal attacks (on each other) told the lawyers in open court, while in session, to "shake hands." The Miami-Herald, April 27, 1980, Section B, at 6, Col. 1. Thus, the Black community was able to see its hero, Dr. Johnny Jones' trial everyday from beginning to end. His conviction brought dismay to the school system and the Black community. Dr. Jones' case, rushed through the prosecutor's office and to trial, partially because of the barrage of adverse publicity, was one of several cases involving black/white confrontations which were the subject matter of much discussion, following what has now been called the "McDuffie" riots in Miami as noted in n.28 *infra.*

[18]See n. 28 *infra.*

[19]*Miranda v. Arizona,* 384 U.S. 436 (1966).

[20]*Collidge v. New Hampshire,* 403 U.S. 443 (1971).

[21]*Dunaway v. New York,* U.S. , 99 S.Ct. 2248 (1979).

"zooms in" on the defendant just as he admits the crime? The lack of the voluntariness of his consent to search, or knowing waiver of his right to counsel, will probably not be aired because of time limitations, commercialism and lack of sensationalism.

Will the need to intersperse portions of the trial with ". . . commercials for soft drinks, soups, eye-drops and seat covers . . ." *Estes, supra,* 381 U.S. at 571, improve the image of justice in America today? Or, will it take such "all-American" advertising as ". . . a dog food . . . and a [Joe Namath] panty hose commercial . . . [or perhaps a 'mean Joe Greene' Coca-Cola ad]," *Post-Newsweek, supra,* 370 So.2d at 776, to "turn the trick" and increase the ratings? How will television and still photographic cameras contribute to the "dignity, decorum and courtesy" of the courtroom? Hazard, *Securing Courtroom Decorum,* 80 Yale Law J. 433, 434 (1970). The list of courtroom rituals, well known to the trial bar, which serve to promote the dignity and decorum of the courtroom, such as the "wearing of the robe"[22] and the solemn austere administration of the "oath," ". . . to tell the truth, the whole truth and nothing but the truth . . . ,"[23] will become as commonplace as the routine at "Archie Bunker's Tavern."

D. There is No Constitutional Basis to Justify Televising a Criminal Trial.

As stated previously, the First Admendment generally grants the press no right to information about a trial superior to that of the general public. *Nixon v. Warner Communications, Inc., supra,* 435 U.S. at 609. Similarly, the

[22]*See* Kennedy, *The Cult of the Robe: A Dissent,* 14 Fordham L.Rev. 192 (1945).

[23]Comment, *Effects of Kinds of Questions and Atmosphere of Interrogation on Accuracy and Completeness of Testimony,* 84 Harv.L.Rev. 1620, 1636 (1971).

Sixth Amendment does not require that the trial, or any part of it, be broadcast live or on tape to the public. *Id.* at 610. The broadcast media cannot "run the show." For as observed in *Dieteman v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) (civil suit seeking damages for alleged violation of invasion of privacy), the ever "increasing capabilities . . . of electronic devices with their capacity to destroy an individual's anonymity, intrude upon his most intimate activities and expose his most personal characteristics to public gaze." *Id.* at 248. While the criminally accused may have no "right of privacy" as to what is said in open court, other unwilling trial participants such as jurors and witnesses ". . . should not be required to take the risk that what is heard and seen will be transmitted by photograph, or recorded in full living color and hi-fi, to the public at large." *Shevin v. Sunbeam T.V. Corp.*, 351 So.2d 723 (Fla. 1977), appeal dismissed, 435 U.S. 920 (1978).

Broadcast media, and the Florida Supreme Court would do well to heed the words of Chief Judge Gourley, who wrote in *Tribune Review Publishing Company v. Thomas, supra,* 153 F.Supp. at 494:

> *The sanctity and inviolability of the court room is the keystone which supports and buttresses the great, massive arch of freedom, and to weaken this keystone is to invite real peril to our basic freedoms. In short, the greatest danger to freedom may well stem from those who seek the license and luxury of increased liberties at the expense of the process which feed life blood to our free institutions.* [emphasis added].

IV.

PERMITTING ELECTRONIC MEDIA AND STILL PHOTOGRAPHIC COVERAGE DURING A CRIMINAL TRIAL, OVER THE DEFENDANT'S OBJECTION, DENIES THE ACCUSED DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT

A. A Denial of Due Process of Law in Cases Involving the Publicity of Criminal Matters May Be Found Even Without an Affirmative Showing of Actual Prejudice.

Whether the accused is a "rich man, poor man, beggarman, thief, doctor, lawyer, merchant, chief," Gould and Gould, *Annotated Mother Goose* (New American Library, 1967), he is entitled to the constitutional guarantee that he not be deprived of "life, liberty or property, without due process of law." Amendment XIV. The televising, in part or whole, of a criminal trial, denies the accused that right. "Television reshapes the way we perceive reality. Before we allow television in even one more courtroom, we must know more about its effects on criminal trials and on our image of justice." Gerbner, *Trial by Television: Are We at the Point of No Return?* 63 Judicature 416 (1980).

It is abundantly clear that pervasive publicity and the intrusion of news media into the trial process itself can so alter, or destroy, the Constitutionally necessary judicial atmosphere and decorum so that the defendant is denied the requirements of impartiality to which he is entitled as a matter of due process of law. *Sheppard v. Maxwell, supra; Estes v. Texas, supra; Rideau v. Louisiana, supra;* and *Irvin v. Doud, supra.* And, the Appellant need not necessarily make an affirmative showing of actual prejudice. "Indeed where the circumstances involve a probability that prejudice

will result, it is deemed inherently lacking in due process. *Sheppard v. Maxwell,* [citation omitted] and *Estes v. Texas,* [citation omitted]." *State v. Stiltner,* 491 P.2d 1043, 1048 (Wash. 1971). *Estes* clearly controls the case at bar. In *Estes, supra,* the trial court held that the presence of television cameras *"involves such a probability that prejudice will result that it is deemed inherently lacking in due process."* 281 U.S. at 542, [emphasis added], (but *see Bradley v. State of Texas,* 470 F.2d 785 (5th Cir. 1973)) (Affirmance of denial of state prisoner's Federal Habeas Corpus petition which alleged violation of due process where court allowed "still and motion photography" of portions of trial). Because the Court decided *Estes* by a five-to-four vote, media proponents claimed that the courtroom door was left ajar, permitting the re-entry of cameras at a future date.[24] Unfortunately, this

---

[24]These views are derived primarily from Mr. Justice Harlan's concurring opinion in which he limits the rule of *Estes* to cases "notorious" in nature. Justice Harlan also reserved ruling on the "run-of-the-mill case" for a future time, but admitted that possibly no workable distinction can be drawn based upon the type of case involved.

The second basis from which media proponents have drawn support is Justice Harlan's statement in concurrence:

> [T]he day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause. 381 U.S. at 595.

Any such reliance upon Justice Harlan's views is misplaced. He does not cast his concurring vote subject to technological improvements. It is not quieter cameras alone which make television more "commonplace an affair in the daily life of the average person." It is psychological and sociological attitudes toward television, and what jurors, witnesses and judges as trial participants and what the viewing public in general believe television represents which will affect television's likely disparagement of the judicial process to the accused's detriment. (See Point III, *supra.)*

optimism has not been bolstered by any showing that the presence of cameras has any less potential for "mischief" now than in 1965. Appellants acknowledge that the cameras' *operations* are less disruptive by virtue of technological improvements (but see R. 374). It is clear, however, that this Court's primary cause of concern was the impact of the camera's *presence* upon the trial's participants, and the jury in particular. Mr. Justice Clark, speaking for the Court, assessed the subtle dangers upon the jury as: 1) the impact of the juror's awareness of the media's interest in the case; 2) the potential distraction from the proceedings; and 3) in the event of a new trial, potential jurors often will have seen and heard telecasts of the original trial. *Estes, supra,* 381 U.S. at 545-548.

Mr. Justice Clark wrote *Estes* for the Court. Chief Justice Earl Warren, and Justices Douglas, Harlan and Goldberg, joined in the Court's judgment. Mr. Justice Harlan concurred in the Court's opinion, subject to certain reservations set out in 381 U.S. at 587-596. Mr. Justice Harlan succinctly stated:

> My conclusion is that there is no constitutional requirement that television be allowed in the courtroom, and, at least as to a notorious criminal trial such as this one, the considerations against allowing televisions in the courtroom so far outweigh the counter-veilling [sic] factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment. *Id.* at 587.

Mr. Chief Justice Warren, (joined by Justices Douglas and Goldberg), also wrote a concurring opinion in *Estes* and said at 381 U.S. at 552.

> *While I join in the court's opinion and agree that the televising of criminal trials is inherently a denial of due process, I desire to express additional views on why this is so* . . [emphasis added].

The Chief Justice went on to state:

> I believe that it violates the Sixth Amendment for federal courts and the Fourteenth Amendment for state courts to allow criminal trials to be televised to the public at large. I base this conclusion on three grounds: (1) That the televising of trials diverts the trial from its proper purpose in that it has an inevitable impact on all the trial participants; (2) that it gives the public the wrong impression about the purpose of trials, thereby detracting from the dignity of court proceedings and lessening the reliability of trial; and (3) that it singles out certain defendants and subjects them to trials under prejudicial conditions not experienced by others. *Id.* at 565.

Mr. Justice Stewart dissented in *Estes* and was joined by Justices Black, Brennan and White. Mr. Justice Stewart wrote:

> I think that the introduction to television into a courtroom is, at least in the present state of the art an extremely unwise policy. It involves many constitutional risks, and detracts from the inherent dignity of a courtroom. But I am unable to escalate this personal view into a *per se* constitutional rule. 381 U.S. 601.

While one could speculate as to what type of rule Mr. Justice Stewart would now promulgate, Appellants believe that Mr. Justice Brennan's joinder in Mr. Justice Stewart's

opinion was likely a result of the "preferred" position they have given the First Amendment as expressed in numerous obscenity cases. Justices White and Brennan also contributed separate dissenting opinions.

Appellants contend ". . . the nub of the question is not [television's] newness but, as Mr. Justice Douglas says, 'the insidious influences which it puts to work in the administration of justice.' Douglas, *The Public Trial and The Fair Press*, 33 Rocky Mt. L. Rev. 1 (1960)" *Estes, supra*, 381 U.S. at 541 (Mr. Justice Clark). As stated *In re Murchison, supra*, 349 U.S. at 625:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system has always endeavored to prevent even the *probability* of unfairness.
>
> * * * * *
>
> [T]o perform its high function in the best way 'justice must satisfy the appearance of justice' *Offutt v. U.S.*, 348 U.S. 11, 14, 75 S.Ct. 11, 13. . . . [emphasis added].

The mere presence of television cameras in a trial denigrates "the appearance of justice," *Offutt v. U.S., supra*, 348 U.S. at 14, and destroys the ability to "hold the balance nice, clear, and true between the state and the accused" *Tumey v. Ohio, supra*, 273 U.S. at 532.

"Due process requires that the accused receive a trial by an impartial jury free from outside influences." *Sheppard v. Maxwell, supra*, 384 U.S. at 362. This Court must take those measures necessary to prevent such influences from infecting the courtroom. *Id.* While answering questions of "substantive

due process has at times been a treacherous field for this Court," *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, 502, (1977), one central theme has emerged, under our system of justice, it is far better for "ten guilty men to go free than for one innocent person to be (unfairly, and without due process of law) convicted."

B. The Failure of the Florida Supreme Court to Conduct Scientifically Reliable and Constitutionally Valid Studies to Determine the Effects of Televising Criminal Trials Fatally Taints Appellants' Convictions.

The Florida Supreme Court cast the State judicial system in an uncharted sea when it authorized one year of televised trials. At least Columbus, when "sailing the ocean blue," had a sextant and the stars to guide his voyage. Except for specifying the kinds of photographic and audio/visual camera equipment which could be brought into the courtroom, no apparent effort was made to establish a "scientific method" by which the experiment could be intelligently and meaningfully monitored, measured and analyzed. The Institute for Study of the Trial at the University of Central Florida prepared a report on the experiment which stated:

> Insufficient courtroom photograph data have been collected to identify all of the ramifications of camera usage or to interpret adequately the initial reactions of judges, attorneys, and the public. The experiment of only one year has produced too little data. More time is needed to permit the newly-formed opinions to incubate and mature so that additional research can be conducted to measure the long-term effects of cameras on the trial process.

Pryor, Strawn, Buchanan and Meeske, *The Florida Experiment: An Analysis of On-The-Scene Responses to Cameras in the Courtroom,* 45 Southern Speech Communication Journal 12, 24 (Fall, 1979).

This study, conducted by a former trial judge, now part-time college professor and trial attorney, and the Chairman of, and two professors at, the University of Central Florida's Department of Communication, was submitted to the Florida Supreme Court *prior* to its decision to make the televised criminal trial rule permanent.

Similar "storm" warnings were given to the Florida Supreme Court both before initiation of the experimental period, after its conclusion, and before the *Post-Newsweek* decision converting the Experimental Canon into a permanent Rule of Court. As early as February 6, 1976, the Florida Bar, through its Assistant Executive Director for Legal Affairs, Richard C. McFarlain, suggested to the Florida Supreme Court that "Qualified research scientists from the Florida State University School of Social Science be authorized to conduct research and measuring tests before, during and after the [televised] trials." (AB. 11). Apparently no such research project was established either before, or during the experimental year. *Post-Newsweek, supra,* 370 So.2d at 767-768.

Incredibly, however, despite the fact that the Florida Supreme Court, in its Supplemental Interlocutory decision of April 7, 1977, in *Post-Newsweek, supra,* admitted it had "met with total failure in securing the conduct of a [televised] trial by consent of the parties" (App. 29), it converted the experimental rule from one which required a defendant's consent into one which did not permit a defendant to have any say in whether his trial was televised (App. 30). In light of the warnings that a "scientifically controlled study" was

necessary, the Florida Supreme Court's decision to proceed without one was akin to the Queen of Heart's remark to Alice, "No! No! Said the Queen. Sentence first — verdict afterwards." *Norton Critical Edition: Alice In Wonderland,* 96 (Gray ed. 1971).

At the conclusion of the Experimental year, the Florida Supreme Court commissioned an "in house" *post hoc* study (OSCA), the efficacy and validity of which will be discussed at Point IV-C, *infra.* Several prominent bar association groups, academicians, *amicus* and social scientists urged the Florida Supreme Court to conduct vigorous, carefully controlled socio-psychological studies before reinstating the broadcast media rule.[25]

It is not surprising, of course, that carefully controlled traditional psychological and sociological tests could not be conducted consistent with "the scientific method," for, after all *a jury trial* is neither a laboratory experiment, nor a game, the outcome of which can be erased and submitted to more sterile procedures, or "replayed in the event of rain." In its simplest form, the "controlled" experiment consists of ". . . selecting two samples at random from the same population and then exposing one — the experimental sample — to an additional influence. The effect of the fresh influence is determined by comparing the final characteristics of members of the experimental sample with those of members of the control sample which were not so exposed. Madge, *The Tools of Social Science,* 299 (Doubleday, 1965).

---

[25]The requests for delay and further study were all filed in the Florida Supreme Court in the original record lodged there under Florida Supreme Court Case No. 46,835, *(In re: Petition of Post-Newsweek Stations, Florida, Inc., supra).*

"Despite those advantages, it is frequently impossible to conduct the 'controlled' experiment outside the laboratory. Moreover, because both the experimental group and the laboratory conditions have been artificially selected, the ultimate results may bear little relevance to real-life situations." Flango, *On the Difficulties of Studying Juries,* 63 Judicature 438 (April, 1980). Using college students or mock juries to conduct experiments presents difficulties which impeach the studies' relevance and reliability. *Id.*

The alternative method of testing is called "quasi-experimental," which is "field" testing. "A field experiment is a research study in a realistic situation in which one or more variables are manipulated *under as controlled conditions as the situation will permit."* Kerlinger, *Foundations of Educational Research,* 382 (Holt, Rinehart and Winston, Inc. 1967). "Field experimenting" with cameras in the courtroom while a defendant is being tried for murder, or as here for burglary, grand larceny, possession of burglary tools and conspiracy, is hardly consistent with traditional notions of our Constitutional system.

Once again it is not difficult to see why no control groups were set up during the one-year pilot. What is constitutionally perplexing, however, is the answer to the question, "Was the camera's presence *sub judice* a factor, conscious or subtle, in the jury's verdict?" Appellants contend that it was a negative factor. University of Pennsylvania's Annenberg School of Communications' Dean, George Gerbner, concurs in this contention:

> And so the bandwagon rolls on its road of nonsequiturs, misplaced demonstrations, self-serving tests and generally flawed 'experiments' that permit no controls, disproof, or evaluation. Gerbner, *Trial by Television: Are We At the Point of No Return?* 63 Judicature 416, 425-426 (April, 1980).

It is well settled that the beneficiary of the claimed constitutional error has the burden of establishing that it was "harmless." *Chapman v. California,* 386 U.S. 18, 24 (1967). *Sub judice,* Post-Newsweek, as the originator of this televised criminal trial rule had an obligation to establish *before* institution of the experimental rule that there was no interference with the accused's right to receive a fair and impartial trial and to due process of law. *Id.* This Post-Newsweek did not do, despite its obligation to "direct some effort to protect the rights of an accused to a fair trial by unbiased jurors." *Nebraska Press Association v. Stuart,* 427 U.S. at 561.

Similarly, the Attorney General of the State of Florida, as the Chief law enforcement officer of the State, has that obligation. Interestingly, the Florida Attorney General at the time Post-Newsweek first proposed the televised criminal trial rule, filed an affidavit in the Florida Supreme Court in opposition to the rule change. When he became a candidate for Governor of Florida, his office had a "change of attitude" and supported the rule change, as obviously does the present attorney general. *Cf, Sheppard v. Maxwell, supra,* 384 U.S. at 345, (Opinion noted Trial Judge and Prosecutor "running" for election at time of trial).

Where there is a reasonable possibility that the presence of the camera may have affected the trial proceedings, the beneficiary of that claimed constitutional error has the burden of proving "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California, supra,* 386 U.S. at 24. Appellee cannot meet this burden *sub judice,* because no effort was made before institution of the experimental program to "test the waters." The *ex post facto* surveys and studies, which will be discussed in Point IV, commissioned and utilized by the Florida Supreme Court simply do not pass scientific reliability, much less constitutional muster.

C. The "In House" Post Hoc Office of the State Court Administration (OSCA) Survey Commissioned by the Florida Supreme Court and Relied upon to Sustain the Experiment in Televising Criminal Trials is Constitutionally Deficient and "Scientifically" Unacceptable.

As indicated in Point IV, *supra,* at the conclusion of the year's experiment, the Florida Supreme Court directed the Office of the State Court Administrator (OSCA) to organize and circulate a questionnaire survey of all televised trial participants (except defendants) and to thereafter compile and publish the results of same. While the manner of the actual creation and organization of the questionnaire, and the assimilation of the material and results, is somewhat of a mystery, the Florida Supreme Court conceded "That the survey results [were] nonscientific and reflect only the respondent's attitudes and perceptions about the presence of electronic media in the courtroom." *Post-Newsweek, supra,* 370 So.2d at 768.

Appellants will analyze the individual constitutional significance of various survey questions in Part IV, *supra.* At this juncture Appellants contend that the OSCA survey relied on by the Florida Supreme Court in *Post-Newsweek, supra,* 370 So.2d 767-769 is totally inconclusive, constitutionally defective and simply not acceptable as "scientific" or "pseudo-scientific" "evidence." It is extremely doubtful whether such a survey, much less the conclusions drawn therefrom, would ever be admitted at a trial or judicial hearing, under current rules of evidence.[26]

---

[26]Hearsay and expert witness objections aside, neither the Florida Evidence Code Ch. 90, Fla.Stat. (1979), nor the Federal Rules of Evidence, would appear to allow either the OSCA survey or its results to be admitted at a judicial proceeding because it lacks the requisite trustworthiness and credibility.

The OSCA survey suffers from the following major defects:[27]

1. It is a well established principle in research that any "in-house" survey is likely to approach its problems and weaknesses with somewhat less than complete objectivity; or at least bring to the problem a certain perspective or point of view. Even institutions, like the humans which run them, suffer from unconscious and unavoidable gaps in objectivity when asked to examine their own problems. This in no way implies a lack of integrity or insincerity on the part of the researchers. It is simply a characteristic of human nature which is inescapable.

2. The Survey itself suffers from the "halo effect," a counter-productive phenomenon inconsistent with true scientific study, in which each of the items under

[27]The critical analysis of the OSCA survey which follows is based on an examination of it by Dr. George J. Mouly (Ph.D.), a professor of Educational Psychology at the University of Miami, and author of *Educational Research: The Art and Science of Investigation* (1978) an expert in the areas of statistical analysis and survey researching. Dr. Mouly was privately retained by Counsel for Appellants in connection with a civil rights suit (filed pursuant to 42 U.S.C. §1983) which had been instituted in the United States District Court for the Southern District of Florida by the undersigned as counsel for other unrelated clients. The object of the civil rights action was to seek an injunction against the enforcement of Rule 3.110, Florida Rules of Criminal Procedure (incorporating amended Canon 3A(7) which authorized televised criminal trials on a permanent basis), and/or in the alternative, a declaratory judgment from that court that the televised criminal trial rule was unconstitutional. Dr. Mouly's critique was never utilized as evidence because the District Judge, Norman C. Roettger, Jr., granted the Attorney General's Motion to Dismiss the suit on the grounds of lack of subject matter jurisdiction (no actual case or controversy) in an unreported decision. That case, *Trinidad v. Stettin*, (S.D.Fla., Case No. 79-1905-Civ-NCR), is now pending on Appeal in the United States Court of Appeal, (5th Cir., Case No. 79-2555). Dr. Mouly "found a sufficient number of departures from minimal research requirements to suggest the need for considerable caution in the interpretation of [its] results" (AB. 14).

examination are approached from the same standpoint, as a result of which, the questions asked "color" or influence each other.

3. Many of the questions posed contain inherent "social desirability" factors, the effect of which interferes with the objectivity of The Survey. (An example are those questions which stress the concept of "government in the sunshine," a particularly "hot" political issue in Florida prior to, during and immediately after the experimental year.) These are "loaded" questions in which the respondent is subsconsciously steered to a preferred result.

4. According to the Florida Supreme Court, "The final survey questionnaires evolved through an eclectic process of review and modification by the Court, the parties, the OSCA staff and interested academicians." *Post-Newsweek, supra,* 370 So.2d 768. Although that statement sounds "nice," it is somewhat misleading.

While the selection process may have been "eclectic," it was hardly scientific or Constitutionally based. Of those four categories of individuals or institutions who participated in the "sifting and winnowing" process, two, the Florida Supreme Court and the Office of the State Court Administrator staff, were actually from, or of, the same "institution." The only "parties" to the nonadversary proceeding were the original proponent. *Post-Newsweek* and the Florida Bar. The latter, although originally opposed to the rule change, was obliged, under Florida's Integrated Bar Rules to act at the Supreme Court's pleasure once the decision had been made to implement the rule allowing broadcast media in the courtroom. The final category, "interested academicians," is as ambiguous as it is mysterious. Except for the name, Pauline Holden, Ph.D., University of Florida Criminal Justice Program (See *Post-Newsweek, supra,* 370 So.2d at 767, n.5), not a single person

is identified nor are the qualifications of the "interested academicians" set out anywhere in the *Post-Newsweek* decision. Nor can one glean from a reading of the decision, who actually retained and paid for the services of these "experts."

How then, under these circumstances, can this Court, or any appellant, attempt to properly appraise the validity of the OSCA study?

5. Overall, the OSCA survey obtained less than a two-thirds response (and barely fifty percent if undelivered and late responses are excluded). In short, the incompleteness of the returns raises, to survey researchers, the question of nonresponse as a source of bias, the magnitude and direction of which will never be known. For example, if two hundred questionnaires were sent out, and one hundred returned, and of those one hundred, sixty said "Yes" to a particular question and forty responded "No" to the same questions, we can say "sixty percent said 'Yes' ," but Survey researchers have to say either "sixty percent of those who responded said 'Yes'," or "sixty out of two hundred persons polled," or "only thirty percent, said 'Yes'." Thus, the overall validity of the survey as providing a true reading of even the "subjective" responses, is in great doubt.

6. The questions and alternative responses were highly subjective, and often speculative. The response alternatives reeked of personal guess-work and individual interpretation. In sum, there was a Constitutionally significant lack of objectivity in the question and answer alternatives.

7. Finally, one must question why the significant discrepancies in response categories for questions 4 and 15, dealing with the dignity of courtroom proceedings and respect for the court, were not pursued? And, why were the respondents not asked about the effects of the television

cameras on the accused or the likelihood of his receiving a "fair" trial? After all, wasn't that what the survey was all about?

The Florida Supreme Court made note of a second survey, not commissioned by it, in *Post-Newsweek, supra,* 370 So.2d at 767, n.6, 769-770. The Court noted that the Florida Conference of Circuit Judges (FCCJ) conducted its own survey, and further, the conference had taken a position in opposition to the proposed televised criminal trial rule. *Post-Newsweek, supra,* 370 So.2d at 770. In the very next breath, the Florida Supreme Court stated, ". . . the empirical data collected [by the Conference] . . . does not seem to support the formal position taken." *Id.*

In fact, the formal position taken by the Conference:

1. Made it quite clear that the State trial court judges were opposed to any change in Canon 3A(7),

2. Underscored the fact that in the experimental year, "with some exceptions the media has shown an interest only in a few sensational criminal cases in which defendants have been charged with notorious crimes," and further, that "only small portions of these cases have reached the viewing audience, more often only the video portion being shown, overlaid by the capsulized audio summary of the reporter," and

3. Concluded that, "[w]ith its selective closeup and editorial comment, it [television coverage] so far surpasses what some more [sic] persons may see and hear in the courtroom that it has an influencing effect both on the person being televised and those who see the recording of that person's image and voice. Unless the entire trial is evenly televised and

photographed, out-of-context emphasis and attention is drawn to selected witnesses and to those moments of high drama and excitement that only occasionally occur in a trial."[28] Hon. Harold R. Clark, Circuit Judge, Chairman, The Florida Conference of Circuit Judges, Report of the Florida Conference of Circuit Judges to the Florida Supreme Court, filed in *In re Post-Newsweek Stations, Florida, Inc.* (July 18, 1978).

---

[28]Regretably, it is as if Judge Clark were gazing into a crystal ball. Massive civil disorder and rioting broke out in Miami, Florida, on Saturday, May 17, 1980, and lasted for several days. Sixteen people were killed, 436 people were injured, 1,267 people were arrested. The resultant property damage (at the time of this writing) came to 100 million dollars. While the riots were largely a result of economic and housing disparity problems in Miami's Black community, the one event which "lit the fuse" was the drama of seeing, on television, the acquittal of four white City of Miami Police Officers who had been charged with beating a black man to death. The now infamous "McDuffie" trial (named ironically for the black victim) had been moved from Miami to Tampa in order to assure the accuseds of their right to a fair and impartial trial. The trial lasted for six weeks. Television coverage of the trial in progress was broadcast back to the Miami area on the evening news on all four of Miami's commercial television stations. Only three to four minutes of each day's courtroom activities were shown, and then, only the most lurid and sensational aspects of the State's case. The televised acquittal stunned the Miami community. The broadcast media showed the defendants rejoicing in full view. Dean George Gerbner, (in an interview with Gannett News Services, published on May 21, 1980) regarding the causal relationship between televising the McDuffie trial and the riots in Miami, observed that, "It is a chilling example of what happens when television selects a trial to televise. Such coverage arouses the emotions of people who might not attend to the news otherwise. What happened in Miami is a very high price to pay for a very little gain. The only gain is spectacle."

The "empirical data" brushed aside by the Florida Supreme Court, as "unsupportive" of the Conference's conclusion and recommendations against the continuation of televised criminal trials included the following significant fact. Of the two hundred eighty-six Circuit Court (trial) Judges in the state, one hundred fifty-five, or fifty-four percent, responded to the Conference's televised trials questionnaire. Ninety-six of the one hundred fifty-five judges had had some experiences with broadcast media in their courtrooms or chambers. Other judges reported experiences with the broadcast media in areas of the courthouse other than their courtrooms or chambers. Twenty-nine of the judges responded that their reactions to broadcast media in relation to televised trials and court proceedings were negative. Thirty-six judges said their reactions were positive, while thirty-seven gave "neutral" responses. See Appendix to Report of the Florida Conference of Circuit Judges, *supra*.

Assuming that the information contained in the Conference Appendix was "empirical," Appellants contend that where twenty-nine of one hundred and two judges, or thirty-five percent of the responding State trial judges report negative reactions to broadcast media in courtrooms and chambers, and around the courthouse, the Florida Supreme Court has totally and callously misinterpreted the very "survey upon which it seeks to rely in an effort to justify the unconstitutional continuation of televised criminal trials."

D. A Close Analysis of The Survey Establishes that there is a Constitutionally Significant Number of Witness and Juror Respondents Whose Acts, Conduct, Behavior, Self-Perception and Role in Televised Trials Were Affected by the Presence of Electronic and Still Photographic Equipment.

The Florida Supreme Court placed a great deal of reliance on the sample survey which its own Administrative Office conducted. *Post-Newsweek, supra,* 370 So.2d 767-769.[29] While not published as part of the *Post-Newsweek* decision *per se, The Survey,* raw data and appendices thereto were filed with the Florida Supreme Court and copies of same were made available to "interested" parties. Appellants, clearly interested, obtained a copy for analysis in this brief.

The Survey is a rhinestone, which fails to rise to the level of gem quality necessary before the noble sails of federally guaranteed Constitutional rights are trimmed. It is obvious that the Florida Supreme Court's misplaced reliance on what it clearly conceded to be a less than scientific study, *Post-Newsweek, supra,* 370 So.2d at 768, has literally emasculated Appellants' rights to due process of law.

The synopsis of *The Survey* and the historical evolution of the experimental program, by the Judicial Planning Coordination Unit (JPCU) of the Office of the State Court's Administrator (OSCA), accurately state that the proponent of the Rule, Post-Newsweek, was supported by various media groups and commercial broadcasting companies. The Florida Bar, Conference of Circuit Court Judges, and the Academy of the Florida Trial Lawyers Association, *inter alia,* opposed the experiment. *The Survey,* at pg. 2. This report also conceded that ". . . the ideal analysis, one which would incorporate an experimental design to measure the impact of the presence of the media and photographers in the courtroom was not feasible." *Id.* at pg. 5.

---

[29]*A Sample Survey Involving Electronic Media and Still Photography Coverage in Florida Courts between July 5, 1977 and June 30, 1978;* prepared by the Judicial Planning Coordination Unit, Office of the State Courts Administration (hereinafter referred to as "The Survey"). *Post-Newsweek, supra,* 370 So.2d at 767, n.4.

Finally, in analyzing its own Survey, the JPCU observed:

> It should be noted that, as indicated above, the Court did not wish to perform an experiment regarding the impact of the presence of electronic media and still photography coverage in the courtroom. Nor, could it have done so under the circumstances of the pilot program.
>
> An experiment encompasses the isolation and testing of a new event upon a particular situation. It requires that the experimenter compare all aspects of the situation, both prior to and after the occurrence of the event, or through control groups, similar situations where the event occurred and did not occur.
>
> This survey of selected trial participants cannot be considered an experiment. No attempt was made to determine the reactions of participants of trials which did not involve media coverage. The information which is contained in this document must be reviewed with this thought in mind to ensure that erroneous interpretations or invalid applications of the data do not result. *The Survey,* at pg. 6.

According to the JPCU's synopsis, *The Survey,* was *designed* and implemented by two members of its own OSCA staff (whose expertise and qualifications in this sensitive area are nowhere described). "Technical assistance" was provided by three other staff members (whose *curricula vitae* are likewise omitted). And, as the Court itself noted, *Post-Newsweek, supra,* 370 So.2d at 767, n.5, Dr. Pauline Holden, University of Florida Criminal Justice Program, "served in a consultative capacity for reviewing the questionnaire format." *The Survey* Synopsis, *supra,* at pg. 7. Appellants

contend that the Florida Bar's suggestion that qualified social scientists from the Florida State University System (AB. 11-13), if followed, would have more likely provided a "truer" reading of the experiment than the above-described individuals, whose qualifications, background and experience in the matters at hand are totally unknown and unreported (officially, at least).[30]

The lack of professional expertise in designing and implementing *The Survey* is underscored by the JPCU's explanation as to why *The Survey* relied on attorneys, as a group, rather than behavioral specialists (such as psychiatrists, pyschologists and social scientists) to assess "the behavior of jurors, witnesses and judges in the courtroom when media was present." *The Survey,* at pg. 8. According to the synopsis, "since . . . [attorneys have] been involved in more than one court situation, it was felt that their answers would be more valid concerning certain behavior than individuals who had only been involved with one trial." *Id.* Whatever else lawyers may be, competent or otherwise, they are engaged in an adversary system and have subjective feelings about witnesses, judges and jurors, which frequently depend upon the outcome of their particular case. Trial lawyers are not professionally trained to make the kind of objective judgment necessary to a meaningful "scientific" study. Thus, the authors of that particular aspect of *The Survey* arrived at a conclusion which may not necessarily have been reasonably, or rationally, derived from the underlying hypothesis.

---

[30]Appellants do not mean to suggest than even highly qualified social scientists could have designed or implemented a meaningful test or survey (see Point IV - C, *supra*), but, having set out on this pilot program, it would have been far better to have utilized the resources of recognized experts rather than unknown novices, especially when one considers the dimensions of the Constitutional problem at stake. After all, the Federal Aviation Administration clearly would not permit a student pilot to fly a 747 Jumbo Jet.

The contents of *The Survey* itself, as reported in *Post-Newsweek, supra,* 370 So.2d 767-770, are likewise susceptible to a chameleon-like quality, depending on who is doing the interpreting. For example, the Florida Supreme Court stated, "More than 2,750 persons participated as judge, attorney, court attache, juror or witness, in trials covered by the electronic media during the experimental period." *Id.* at 767 [footnote omitted]. Yet, only 2,660 survey questionnaires were sent out by OSCA, and only 1,349 were returned in time to be used in *The Survey*. *Id.* at 768 and *The Survey, supra,* Appendix.

Significantly, only 44% of all witnesses who received questionnaires returned them in time; 65% of the attorneys and jurors were timely, and 72% of the court personnel[31] (probably the least important group of respondents in terms of the constitutional impact of media broadcasting) responses were seasonal. *Id.* Thus, one of the groups on which the effects of media broadcasting (witnesses) is critical had the lowest percentage of return rate and the constitutionally least important group had a tremendously greater response. No apparent effort was made to "grade" or "weigh" groups according to the role they "played" at trial. Thus, we see, from the very start, the wisdom of the Eighteenth Century British Statesman, George Canning, who remarked, "Statistics — I can prove anything by statistics — except the truth!"

The Florida Supreme Court's opinion studiously avoids a rather telling statistic obtained from attorneys who were surveyed. In the "Attorney — Biographical Data" portion of *The Survey* synopsis, *supra* at 22, the respondent attorneys were asked:

[31] i.e., bailiffs, court clerks and court reporters

In general, your feelings about your court service *prior* to allowing cameras in the court were:

1.	Very Favorable	59.1%
2.	Favorable	37.4%
3.	Undecided	2.6%
4.	Unfavorable	.9%
5.	Very Unfavorable	0%

In general, your feelings about your court service *where cameras,* photographers and related equipment *were present were:*

1.	Very favorable	39.7%
2.	Favorable	28.9%
3.	Undecided	10.7%
4.	Unfavorable	10.7%
5.	Very Unfavorable	9.9%

[emphasis added].

Appellants are mystified as to how the Florida Supreme Court could so cavalierly ignore the overwhelming increase in the adverse reactions of the Bar's trial attorneys, from less than 1% to 20.6%.

Even if the Court determines that *The Survey* was validly and scientifically conducted, Appellants' analysis of *The Survey* challenges the very integrity of the Florida Supreme Court's reliance upon, and the conclusions drawn, from specific Survey questions. Appellants contend that the sixteen "general indications," *Post-Newsweek, supra,* 370 So.2d at 768-769, to which the Florida Supreme Court so proudly points as indicia of the lack of Constitutional error, on closer and more careful examination, actually support the proposition that a Constitutionally significant statistical response indicates that electronic media and still

photographic presence during a trial in progress denies the accused a fair and impartial trial and due process of law.[32]

The Florida Supreme Court concluded, *Post-Newsweek, supra,* 370 So.2d at 768, [Footnote omitted]:

> (1) Presence of the electronic media in the courtroom had *little* effect upon the respondents' perception of the judiciary or of the dignity of the proceedings.

An analysis of Question 4 of *The Survey* shows jurors and witnesses felt a 14.7% and 27.3% *decrease,* respectively, in their perception of "courtroom dignity;" likewise, Question 15 produced an 8.4% and 16.5% decrease in jurors' and witnesses' "respect for the courts." Those percentages are hardly "little."

The Court then went on to state, *Post-Newsweek, supra,* 370 So.2d at 768, [Footnote omitted]:

> (2) It was felt that the presence of electronic media disrupted the trial either not at all or only slightly.

In fact, in response to Survey Question 5, "[t]o what extent did the presence of television, photographic or radio coverage in the courtroom disrupt the trial?", 22.4% of the jurors and 43.1% of the witnesses responded that broadcast media disrupted the proceedings either "slightly," "moderately," "very" or "extremely."

---

[32]This Court has not hesitated in the past to apply statistical evidence in arriving at judgments which have held that defendants have been denied equal protection of the law. *See, for example, Alexander v. Louisiana,* 405 U.S. 625 (1972); *Castaneda v. Partida,* 430 U.S. 482 (1977); *See also* Baldus and Cole, *Statistical Proof of Discrimination,* (1980).

Next the Florida Supreme Court concluded, *Post-Newsweek, supra,* 370 So.2d at 768 [Footnote omitted]:

> (3) Respondents' awareness of the presence of electronic media averaged between slightly and moderately.

But, only 19.5% of the jurors and only 20% of the witnesses responded that they were "not at all" aware of electronic media's presence. *The Survey,* Question 6. Are not Appellants Constitutionally entitled to *no disruption* by the "awareness" caused by the presence of broadcast media?

The Florida Supreme Court then stated, *Post-Newsweek, supra,* 370 So.2d at 768 [Footnote omitted] that:

> (4) The ability of the attorney and juror respondents to judge the truthfulness of witnesses was perceived to be affected not at all. The ability of jurors to concentrate on the testimony was similarly unaffected.

Actually, 3.8% of the jurors responded that electronic media presence either "slightly" or "greatly" hindered their "ability to judge the truthfulness of the witness." *The Questions 7 and 15.* 15.5% of the respondent jurors admitted that broadcast media's presence affected their ability to "concentrate on the testimony." *The Survey,* Question 8.

Our system of justice was designed to prevent jurors from arriving at decisions affected in some way by "outside" influences. To the accused, and as Appellants contend, to this Court, a 3.8% hindrance factor *is* constitutionally significant. A 15.5% disruption in a jury's ability to concentrate on a witnesses' testimony clearly rises to the level of a due process violation.

The Florida Supreme Court's next observation was, *Post-Newsweek, supra,* 370 So.2d at 768 [footnote omitted], that:

> (5) All respondents were made to feel slightly self-conscious by the presence of electronic media.

Even this conclusion is inconsistent with the data in *The Survey.* For example, 3.5% of all jurors, and 6.6% of all witnesses responded that they were "extremely" self-conscious as a result of broadcast media's presence. *The Survey,* Question 9.

The Florida Supreme Court then concluded, *Post-Newsweek, supra,* 370 So.2d at Page 768 [footnote omitted], that:

> (6) Both jurors and witnesses perceived that the presence of electronic media made them feel just slightly more responsible for their actions.

Once again, the Florida Supreme Court has misread the significance of that particular survey question. Proponents of the televised criminal trial rule have long and loudly proclaimed that broadcasting, (live and in full color), criminal trials in progress will make the jurors and witnesses more responsible for their actions and conduct. In fact, that, along with the "educational carrot" dangled in front of the Florida Supreme Court, has been media's most publicly vocal argument. Yet the response to *Survey* Question 10 makes clear that 76% of the jurors and 61.2% of the witnesses were not made to feel responsible at all by the presence of television, photographic or radio coverage.

Next, the Florida Supreme Court found, *Post-Newsweek, supra,* 370 So.2d at Page 768 [footnote omitted], that:

(7) Presence of electronic media made all respondents feel *only slightly nervous* or more attentive. [emphasis added].

Appellants have difficulty reconciling the above statement with the realities of *The Survey* responses. It is almost as if the Florida Supreme Court had a different set of responses and compiled data than that supplied by the OSCA to the undersigned and the public. In fact, 25.3% of all jurors and 46.7% of all witnesses who responded to *The Survey* admitted to degrees of nervousness as a result of the presence of broadcast media, ranging between "slightly," "moderately," "very" and "extremely." And, only 19.8% of all jurors and 35.8% of all witnesses who responded (not all, as the Florida Supreme Court stated) reported they were either "slightly," "moderately," "very" or "extremely" more attentive as a result of television's presence. *The Survey, supra,* Question 11 and 12.

One might argue that making witnesses and jurors "more attentive" is a positive feature of "Cyclops' " presence. But, when we begin to impose novel amendments to time honored systems, we first ought to be certain that individual rights are not swept away by the sea of "change for change's sake."

The Florida Supreme Court next concluded, *Post-Newsweek, supra,* 370 So.2d at Page 769 [footnote omitted] that:

(8) The distracting effect of electronic media was deemed to range from *almost not at all* for jurors, *to slightly* for witnesses and attorneys. [emphasis added].

Once again, this statement is misleading. *The fact of the matter is that 23.1% of the jurors and 39.4% of the witnesses*

admitted that the presence of broadcast media during the trial distracted them. *The Survey,* Question 13.

Are not those two figures Constitutionally significant?

The next conclusion by the Florida Supreme Court, *Post-Newsweek, supra,* 370 So.2d at Page 769 [footnote omitted] was that:

> (9) The degree to which jurors and witnesses felt the urge to see or hear themselves on the media fell between not at all and slightly.

In *Estes v. Texas, supra,* Mr. Justice Clark, without the benefit of a crystal ball, stated that absent juror sequestration, ". . . jurors would return home and turn on the TV if only to see how they appeared upon it." *Id.,* 381 U.S. at Page 544. Mr. Justice Clark's statement even presumes the trial judge would admonish the jurors not to do just that. *Sub judice, The Survey response established, contrary to the Florida Supreme Court's statement, that 27.7% of the jurors and 37.4% of the witnesses admitted they had an urge to see or hear themselves on the media, The Survey,* Question 14.[33]

The Florida Supreme Court then concluded, *Post-Newsweek, supra,* 370 So.2d at Page 769 [footnote omitted] that:

---

[33]In the highly publicized Dade County, Florida, televised first degree murder trial of *Ron Zamora,* the jury was sequestered. Television sets were removed from their hotel rooms and they were instructed by the judge not to watch television. During the second week of trial, the foreman of the jury requested that the jury be ". . . allowed to watch themselves on television with the sound turned off, just to see what [they] look[ed] like." (AB 15) The trial judge properly denied the request. *Id.* But, a star was born . . . . twelve of them!

(10) *Presence of electronic media* affected the different participants' sense of the importance of the case in varying degrees. *Jurors felt that it made the case more important to a slight degree; witnesses to a degree between slightly and moderately;* court personnel slightly; and *attorneys moderately.*

The Survey, Question 16, reflects that *48% of the jurors and 58% of the witnesses* felt the "presence of television, photographic or radio coverage in the courtroom during the trial made the case *more important." Id.* Does it make any difference at all, as a matter of due process of law, whether the responses to that question were "slightly," "moderately," "very" or "extremely?" Of course not! The percentages speak for themselves. "Matters of degree" are really quite beside the point. Would the FDA permit the continued sale of a drug where, after research, it found that__% of those using the drug became "slightly" ill,__% became "extremely" ill, and *only*__% died?

The next conclusion of the Florida Supreme Court, *Post-Newsweek, supra,* 370 So.2d at Page 769 [footnote omitted], was that:

(11) To a degree between not at all and slightly, *jurors perceived that the presence of electronic media in the courtroom during the testimony of a witness made that witness's testimony more important.*

Forgetting about "degrees," the fact of the matter is that *26.5% of the jurors felt that the presence of a television camera during the testimony of a witness made that witness' testimony "more important." The Survey,* Question 17.

By implication, this means, as occurred *sub judice,* the portion of the witness' testimony which is televised is "more important" than the portion which is not in the "spot-light," at least to 26.5% of the jury. *Sub judice* the television camera was present during John Sion's testimony on direct

examination. (R.374) No cameras were present on cross-examination, nor was there a camera present during presentation of defense testimony. Therefore, we may conclude from the study that slightly more than one-fourth of the trial jury below "felt" the televised testimony was "more important." Is that due process of law?

The Florida Supreme Court then concluded, *Post-Newsweek, supra,* 370 So.2d at Page 769 [footnote omitted], that:

> (12) There was no significant difference in the participants' concern over being harmed as a result of their appearance on electronic media broadcast (including still photography) as opposed to their names appearing in the print media. In each instance the concern ranged on the scale between not at all and slightly.

While there might not have been any "significant difference" as stated by the Florida Supreme Court above, 39.6% of the jurors and 29% of the witnesses expressed some degree of concern over being televised in the context of this particular question. *The Survey,* Question 19. 39.1% of the jurors and 29.4% of the witnesses expressed some degree of concern over being photographed (by newspapers), *Id.,* at Question 20; 36.1% of the jurors and 28.1% of the witnesses expressed varying degrees of concern about "being in the newspapers,"[34] *Id.,* at Question 21; and, by comparison, only 23.6% of the jurors and 21.1% of the witnesses expressed concern over their participation being on radio. *Id.,* at Question 22.

Perhaps, then, it is true that "a picture is worth a thousand words!"

---

[34]A better question would have been what degree of concern, if any, would the witnesses and jurors have if just their name, without a picture, appeared in the newspaper. A trained researcher would have seen the significance of that question.

The Florida Supreme Court next concluded, *Post-Newsweek, supra,* 370 So.2d at Page 769 [footnote omitted], that:

> (13) Jurors and witnesses manifested the same attitude concerning the possibility that persons would attempt to influence their decision or testimony. There was no discernible difference in the height of their concern as between electronic and print media; the average response was slightly on the lower end of the spectrum between not at all and slightly.

The juror response about varying degrees of concern with respect to "attempts to influence" as a result of:

(a)	being on television was	19.1%
(b)	being photographed was	15.8%
(c)	radio coverage was	11.8%
(d)	newspaper coverage was	14.4%

The Survey, Questions 23a, 24a, 25a and 26a.

Witness responses to the same question were as follows:

(a)	being on television was	17.5%
(b)	being photographed was	16.1%
(c)	radio coverage was	14.0%
(d)	newspaper coverage was	16.4%

The Survey, Questions 23b, 24b, 25b and 26b.

Insofar as "flamboyancy" of attorneys and witnesses is concerned, the Florida Supreme Court's findings are, Appellants contend, relatively inconsequential in terms of the Constitutional issue, *Post-Newsweek, supra,* 370 So.2d at Page 769 [footnote omitted]:

> (14) Court personnel and attorneys perceived that the presence of electronic media made the participating attorneys' actions more flamboyant only to a slight extent.
>
> (15) Court personnel and attorneys were of the attitude that the presence of electronic media affected the flamboyancy of witnesses to a degree between not at all and slightly.

After all, what well prepared, competent, skilled trial attorney does not yearn for that moment in his career when he can step into "Clarence Darrow's shoes" and with just the right word, just the right phrase, just the correct gesture and intonation, "snatch victory from the jaws of defeat!" And, a well-prepared, well-trained, skilled trial lawyer should have little difficulty dealing with the "flamboyant" witness who comes to court with his "make-up bag and blue shirt."

The Florida Supreme Court's broad statement, *Post-Newsweek, supra,* 370 So.2d at Page 769 [footnote omitted], however, that attorneys:

> [(16)] . . . also felt that the witnesses were slightly inhibited by the presence of electronic media and that jurors were made slightly self-conscious, nervous, and distracted, but also slightly more attentive,

oversimplifies the problem.

In the first place, for whatever value the attorneys' judgment of the witness' condition and attitude, the following were the attorneys' Survey responses to the question, "Did the presence of television, photographic or radio coverage in the courtroom",

(1) "make the witness more self-conscious?"

75.9% of the attorneys said, "yes" in one degree or another. *The Survey,* §II, Appendix 3, Question 1.

(2) "make the witness more cooperative?"

83.2% said "not at all." *Id.,* Question 2.

(3) "make the witness more nervous?"

75.2% of the attorneys said "yes" in one degree or another. *Id.,* Question 3.

(4) "make the witness more attentive?"

64.7% of the attorneys said "no." *Id.,* Question 4.

(5) "distract the witness?"

62.8% said "yes" in one degree or another. *Id.,* Question 6.

(6) "inhibit the witness?"

56% said television did inhibit the witness to one degree or another. *Id.,* Question 7.

The Florida Supreme Court overlooked certain other aspects of the study, which Appellants contend support their claim of denial of due process of law. For example, the following responses were elicited with respect to the following *Survey, supra,* questions:

(1) "Was the presence of the equipment distracting to you personally?" *The Survey, supra,* Question 33.

11% of the jurors said yes, as did 21% of the witnesses and 41.9% of the attorneys.

While media proponents may claim modern technology reduces "distraction," *The Survey* responses seem to indicate to the contrary.

(2) "To what extent did the presence of television, photographic or radio coverage in the courtroom make you [the respondent attorney] nervous?" *Id.*, §II. A.2., Question 4c.

40% of the respondent attorneys indicated that they were nervous to some degree, ranging from "extremely" (2%) to "slightly" (26.7%). Right to counsel, guaranteed by the Sixth Amendment to the United States Constitution, carries with it right to effective counsel. Where 40% of the attorneys engaged in trials expressed some degree of nervousness by virtue of the presence of television, photographic or radio coverage in the courtroom, one must be concerned, seriously, with the question of effective representation of counsel.

(3) "To what extent did the presence of television, photographic or radio coverage in the courtroom distract you [the respondent attorney]?" *Id.*, at Question 6.

59.3% of the attorneys expressed that they were distracted to one degree or another.

(4) "To what extent did the presence of television, photographic or radio coverage in the courtroom distract the judge?" *Id.*, §III. A.2, Question 12.

42.4% of the respondent attorneys indicated that in their view the presence of television, photographic or radio coverage in the courtroom "distracted" the judge. Where one's life, liberty or property is at stake, due process of law compels an attentive judge free from "outside influence." No matter how well prepared the Trial Court and the litigants' attorneys may be, in virtually every trial there are exigencies which cannot be anticipated, questions asked or answers given, which require immediate action by either the attorney (in the nature of an objection) or the Court. As a result of this broadcast media "happening," trial judges must now be not only diligent to the normal activities and events which transpire in every trial, keep notes for appropriate rulings on motions, objections and the like, but in addition, suffer the "distraction" that a significant number of attorneys perceived to exist during their trials as indicated in *The Survey*.

These then are the cold facts. The prominent early Twentieth Century English manufacturer, Sir Harold Bowden, said, "Facts that are not frankly faced have a habit of stabbing us in the back!" While the Florida Supreme Court may have been well-intentioned in the commission of *The Survey*, the foundation on which it was built was quicksand, not concrete.

E. Due Process of Law Compels Closing the Courtroom to the Camera's Eye.

"The law, however, favors publicity in legal proceedings, so far as that object can be attained without injustice to the persons immediately concerned." 2 *Cooley's Constitutional Limitation* 931 (Carrington ed. 1927). While ordinarily this Court has required, in most cases involving claims of due process of law violations, a showing of identifiable prejudice to the accused, exceptions have been carved to that Rule where, ". . . a procedure employed by the State involves

such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes, supra,* 381 U.S. 542-543. This Court has followed that rule in *Rideau, supra; Turner v. State of Louisiana,* 379 U.S. 866 (1965); and, in somewhat slightly different context, *Gideon v. Wainwright,* 372 U.S. 335 (1963) and *White v. State of Maryland,* 373 U.S. 59 (1963). *Estes, supra,* at Page 544.

As demonstrated by the very study which Florida seeks to rely on to sustain the electronic media experiment, "[t]elevision in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced." *Id.* And, the Court ought not require the Appellants to go beyond that rule today. The Court did not recede from that basic proposition in *Shepperd v. Maxwell, supra,* nor ought it now. To permit the media to continue to "wag" the State Court's "tail" on the grounds of their spurious claim of a "superior right to access" would allow our courts to violate the Sixth and Fourteenth Amendments with impunity, safe in the knowledge that state courts could wash their hands at the alter of the First Amendment in a manner not consistent with due process of law.

CONCLUSION

Television is like the "Devil's Hook" — so tempting, yet so very dangerous. Why even nibble at media's bait? The day of the printed word is far from ended. Although a radio bulletin may swiftly deliver a message, and even though "eye-witness" television news may be graphic, yet content, context, clarity and meaning must be added. Even if the electronic media had a Constitutional right to televise a trial in progress, people simply cannot absorb meanings at the speed of light. Continuation of televised criminal trials will destroy the intent and purpose of the Sixth and Fourteenth Amendments.

The televising of a criminal trial in progress does not contribute one iota to the fact-finding process, to the "search for the truth." The mere presence of television cameras is, subconsciously distracting to, and disruptive of, the trial process itself. The English journalist, C. P. Scott, is reported to have said, "Television? The word is half Latin and half Greek. No good can come of it." Televising criminal trials has not promoted the ends of justice, nor has it truly "educated" the public. Why then, should this experiment in electronic justice continue? As stated by Lord Denman, while addressing the House of Lords in the case of *O'Connell v. Queen,* (1844), "If such a practice [improper jury selection] should be allowed to pass without a remedy . . . trial by jury itself, instead of being a security to persons who are accused, will be a delusion, a mockery, and a snare." 1 Cox, *Reports of Cases in Criminal Law Argued and Determined in All the Courts in England and Ireland,* 519 (1846).

The Appellants' Constitutional Rights to a fair and impartial trial, and to due process of law are clearly superior to the broadcast media's unsupported claim that the presence of television cameras in a criminal trial will enable the public "to know" what is happening in our courtrooms.

Media access is not without limitations. This is so because, as Napoleon is reputed to have said, "A journalist is a grumbler, a censurer, a giver of advice, a regent of sovereigns, a tutor of nations. Four hostile newspapers are more to be feared than a thousand bayonnets."

"Due process of law requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communication and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to insure that the balance is never weighed against the accused." *Shepperd v. Maxwell, supra,* 384 U.S. at 362. "[J]ustice must satisfy the appearance of justice." *Offutt v. United States,* 348 U.S. 11, 14 (1954).

"The 'double feature' has ended. The show is over; [Appellants contend] the verdict is in: [electronic media is] guilty," *Rhodes v. State,* 283 So. 2d 351, 359 (Fla. 1973), of violating the Sixth and Fourteenth Amendments by its insistence upon televising criminal trials in progress over the accuseds' objection. The judgment below should be reversed.

Respectfully submitted,

JOEL HIRSCHHORN, P.A.
742 Northwest 12th Avenue
Miami, Florida 33136
(305) 324-5320

By: Joel Hirschhorn,
Attorney for Appellants
Chandler and Granger

APPENDIX

APPENDIX TO BRIEF

Index

Page

1. Order Certifying Question to Florida Supreme Court Pursuant to Rule 4.6 F.A.R. AB-2

2. Order Denying Renewed Motion Challenging Constitutionality of Canon 3A(7). AB-4

3. Summary Table of States Permitting Television, Radio and Photographic Coverage of Judicial Proceedings. AB-5

4. Drawing by Levin; ©1979, The New Yorker Magazine, Inc., September 3, 1979 at p. 58. ..... AB-10

5. Letter From Richard C. McFarlain, Esquire, Assistant Executive Director, Legal Affairs, The Florida Bar, to Hon. B. K. Roberts, Chief Justice, Florida Supreme Court, dated February 6, 1976. .. AB-11

6. Letter From Dr. George J. Mouly, University of Miami, School of Education, to Joel Hirschhorn, Dated May 27, 1979. ..... AB-13

7. Excerpt of Trial Proceedings in *State v. Ronney A. Zamora,* Circuit Court, Eleventh Judicial Circuit in and for Dade County, Florida, Case No. 77-25123A. AB-15

8. Letter from WHR Investigations, Inc. to Joel Hirschhorn, dated April 29, 1980. ..... AB-16

9. Excerpt of Trial Proceedings in *State v. Johnny L. Jones,* Circuit Court, Eleventh Judicial Circuit in and for Dade County, Florida, Case No. 80-3039B. AB-17

IN THE CIRCUIT COURT
OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO.: 77-5070

STATE OF FLORIDA,

Plaintiff,

-vs-

ROBERT GRANGER AND NOEL CHANDLER,
Defendants.

ORDER CERTIFYING QUESTION TO FLORIDA SUPREME COURT PURSUANT TO RULE 4.6 F.A.R.

STATEMENT OF FACTS

Defendants, City of Miami Beach Police Officers, have been informed against by the Dade County State Attorney's Office in the above-styled cause and charged with Conspiracy, Burglary, Grand Larceny, and Possession of Burglary Tools. The Defendants' arrest and arraignment have been reported in media within Dade County, Florida.

Defendants, through counsel, have filed their motion to declare Florida's experimental Rule 3A(7) unconstitutional as written and as applied, attacking this Court's order modifying the Canons of Judicial Ethics found in 32 FSA Pocket Part and Rule 3.110 as set forth with more particularity in the Florida Supreme Court's Opinion of June 17, 1977, in the case styled *In Re: Petition of Post-Newsweek Station,* ____ So.2d ____ (1977).

While the granting of [sic] denying of Defendants' motion, (a copy of which is attached hereto as Exhibit 1), [Exhibit 1 is omitted as it is set forth in full in A. 3-4 and R. 1117-1118] will not necessarily be dispositive of the case against the Defendants, the motion does raise, in this Court's opinion, a question or proposition of law which is without controlling precedent in this State. The undersigned judge believes that instruction from this Court will facilitate the proper disposition of Defendants' motion and presumably thereby eliminate the possibility of reversible error should there be a conviction in this case.

QUESTION OF LAW TO BE ANSWERED

WHETHER, NOTWITHSTANDING THIS COURT'S DECISION *IN RE: PETITION OF POST-NEWSWEEK STATIONS,* ____ So. 2d ____ CASE NO. 46,835, DECIDED JUNE 17, 1977, A CRIMINAL TRIAL MAY BE TELEVISED OVER THE OBJECTION OF THE DEFENDANT, IN THE LIGHT OF ESTES v. TEXAS, 381 U.S. 532 (1965).

DONE AND ORDERED at Miami, Dade County, Florida, this 27th day of July, 1977.

/S/
ALAN R. SCHWARTZ
DADE COUNTY CIRCUIT COURT
JUDGE

(Certificate of Service Omitted)

* * * * *

(Title of Case and filing
information Omitted)

ORDER DENYING RENEWED MOTION
CHALLENGING
CONSTITUTIONALITY OF CANON 3A(7)

THIS CAUSE having come on to be heard before me upon Defendants' Renewed Motion for Order Challenging the Constitutionality of Experimental Canon 3A(7) and seeking an Order precluding live coverage of the Defendants' trial, and the Court having considered said Motion and being otherwise fully advised in the premises, it is thereupon

ORDERED and ADJUDGED that said Motion be and the same is hereby DENIED.

DONE and ORDERED in Open Court at Miami, Dade County, Florida, this 31st day of October, 1977.

_____
CIRCUIT COURT JUDGE

(Certificate of Service
and Clerk's Certification of
True Copy Omitted)

[Please note that this Order is in the Original Record, unnumbered, but should be found at R. 1126]

National Center for State Courts
300 Newport Avenue
Williamsburg, Virginia 23185
(804) 253-2000

Edward B. McConnell
Director

RULES CONCERNING TELEVISION, RADIO AND PHOTOGRAPHIC COVERAGE OF JUDICIAL PROCEEDINGS

SUMMARY TABLE

A. STATES THAT PERMIT COVERAGE ON PERMANENT BASIS

State	Authority and Nature of Coverage	Effective Date
1. Alabama	Supreme Court authorizes and approves coverage plan. Consent of parties required.	Feb. 1, 1976
2. Alaska	Supreme Court ruled in favor of permitting coverage of trial and appellate courts on a permanent basis. Consent of parties is required. A one-year pilot program concluded September 1979.	Nov. 1, 1979
3. Colorado	Judicial Canons permit coverage (first state to allow.) Consent of the accused, witness, juror and judge required.	Feb. 27, 1956
4. Florida	Supreme Court ruled in favor of allowing cameras and recording equipment on permanent basis. A one-year experiment completed June 30, 1978 and its evaluation preceded the Court's unanimous	May 1, 1979

	decision on April 12. Presiding judge can prohibit coverage for cause. No consent required.	
5. Georgia	Supreme Court authorizes and approves coverage Plan. All plans require prior consent.	May 12, 1977
6. New Hampshire	Supreme Court authorized coverage of its proceedings. Supreme Court also approved a Superior Court resolution to allow trial coverage with the permission of the judge. No consent required.	Jan. 1, 1978
7. Tennessee	Supreme Court rules permit coverage on a permanent basis. Each plan must be approved by trial court and the Supreme Court. Consent required. Parties, jurors and witnesses can bar their individual coverage. Experimental coverage of proceedings in the Supreme Court lasted from May 26, 1978, to February 1979.	Feb. 27, 1979
8. Texas	Supreme Court authorized coverage of appellate proceedings.	Nov. 9, 1976
9. Washington	Supreme Court approved rule allowing coverage. If witnesses and jurors express prior objection, no telecast or photographs allowed. Test was authorized and conducted in 1974.	Sept. 20, 1976
10. Wisconsin	Supreme Court rules permit coverage on a permanent basis. Consent is not required except for coverage of individual jurors. A one-year experiment was completed on March 31, 1979.	July 1, 1979

B. STATES THAT PERMIT COVERAGE ON EXPERIMENTAL BASIS

State	Authority and Nature of Coverage	Effective Date
1. Arizona	Supreme Court authorized one-year experimental coverage of appellate proceedings.	May 31, 1979
2. California	Judicial Council approved one-year experimental coverage. Approval of the judge is required. Consent of the defendants is needed. A separate evaluation of the experiment will be conducted. [It is significant to note that California modified its rule to require the defendant's consent after this Court noted probable jurisdiction in this case.]	June 1, 1980
3. Idaho	Supreme Court authorized seven-month experiment in coverage of its proceedings has been extended for an indefinite period in Boise. Rules now permit one-year experimental coverage in locations outside of Boise.	Dec. 4, 1978
4. Iowa	Supreme Court approved one-year experimental coverage of trial and appellate proceedings at the discretion of the judge. No consent is required.	Jan. 1, 1980
5. Louisiana	Supreme Court authorized a one-year pilot program in Division B of the Ninth Judicial District Court. The experiment was extended. Consent is required.	Feb. 23, 1978

B. STATES THAT PERMIT COVERAGE ON EXPERIMENTAL BASIS (continued)

6. Mass.	Supreme Judicial Court allowed one-year experimental program in appellate and trial courts. Consent is not required.	April 1, 1980
7. Minnesota	Supreme Court authorized experimental coverage in the Supreme Court. Test period not specified.	Jan. 27, 1978
8. Montana	Supreme Court suspended the ban for a two-year experimental period. Consent was not required. Survey is being conducted to evaluate the experiment.	April 1, 1978
9. Nevada	Supreme Court authorized one-year coverage on an experimental basis. Consent of the parties is not required.	April 7, 1980
10. New Mexico	Supreme Court approved televising of appellate and trial court proceedings. Rules and guidelines are to be finalized. Effective date has not been determined.	
11. New Jersey	Supreme Court approved experimental coverage for one-year or until at least six trial-court cases have been covered. No consent required.	May 1, 1979
12. North Dakota	Supreme Court authorized one-year experimental coverage of its proceedings. The experiment has been extended to July 1, 1980.	Feb. 1, 1979
13. Ohio	Supreme Court authorized one-year experimental coverage of trial and appellate proceedings. Consent not required.	June 1, 1979

14. Oklahoma	Supreme Court authorized one-year experiment has been extended for another year. If prior objection is expressed, telecast or photographs not allowed.	Jan. 1, 1979
15. Pennsylvania	Supreme Court authorized one-year experimental program to allow coverage of non-jury civil trial proceedings, if the trial judge permits. Consent is not required. If a party or witness expresses prior objection judge can disallow coverage.	Oct. 1, 1979
16. West Virginia	Supreme Court approved a six-month experiment in Mononhagela County Circuit Court (Morgantown). Consent was not required. Report of the experiment is expected.	Jan. 22, 1979

C. STATES ACTIVELY CONSIDERING ALLOWING COVERAGE

Arkansas, Connecticut, Michigan, Mississippi, Nebraska, New York, Rhode Island, Utah, and Vermont.

D. Legislative Developments in the States

1. Louisiana: Revised Section 4164 of Title 13 of the Louisiana Revised Statutes, in part, reads "no proceeding in any court within this state shall be televised or recorded by television equipment." Recording of proceedings is allowed in "accordance with the terms of a motion and stipulation agreed to by all parties to the proceeding and approved by the judge hearing the matter."

2. Maine: Recently passed statute requires that all pretrial criminal proceedings be open to the general public unless the court finds a substantial reason to disallow. (15 MRSA Section 457).



"For heaven's sake, man, look ashamed. We're being televised."

• •

Drawing by Levin; © 1979
The New Yorker Magazine, Inc.

THE FLORIDA BAR

Legal Affairs

Tallahassee, Florida 32304
Telephone (904) 222-5286

February 6, 1976

Honorable B.K. Roberts
Chief Justice, Supreme Court
of Florida
Supreme Court Building
Tallahassee, Florida 32304

Re: Petition of Post-Newsweek Stations, Florida, Inc. For Change in Code of Judicial Conduct.

Dear Justice Roberts:

I write this to you as the Court's senior Justice. As such, you have been designated Conferee in charge of the Post-Newsweek Petition. The purpose of this letter is to suggest an approach to this matter that, if adopted, will allow the Court to have the benefit of objective scientific analysis unclouded by the advocacy of any of the proponents or opponents of cameras in the courtroom.

The Bar's basic objections are unchanged. However, as the Court has allowed two exemptions to be made to Canon 3A(7), we feel duty-bound to assist the Court in the experiment. Toward this end I propose that qualified research scientists from the Florida State University School of Social Science be authorized to conduct research and measuring tests before, during and after the trials. These

tests would, of course, be subject to Judge Willis' overall control.

When the results of the tests are in, the Court can have the advantage of scientifically measured responses from all participants. This will be particularly valuable in the Court's determination on the importance of the stress factor, embarrassment if any, anxiety, "ham actor" tendencies and other factors not well measured by the profession nor the industry.

In the hope that you will look with favor upon this attempt to come up with measurable scientific data, I have contacted Dr. Kent Miller and Dr. Jack Brigham. Dr. Miller is with the Institute of Social Research and Dr. Brigham with the Department of Psychology at FSU. They think well of the project and are willing to work on this experiment as established by the Court. They have access to the full University's facilities including help from qualified graduate students. They feel, and I agree, that to do a competent job they would need the Court's blessing.

Specifically: 1) they need to clear in advance, procedures to maximize their ability to obtain an unbiased and objective evaluation of the effects of cameras and electronic equipment on the proceedings and, 2) they will need assistance in the research design wherein all the parties involved in direct observation of the proceedings are involved and access to the records and tapes from the proceedings.

If this research is permitted by the Court, it may go far in getting us measurable proof of what counsel only speculate upon in their advocacy. The Court, of course, would not be bound by their findings. No matter how interesting they may prove to be, such a small sampling could not be considered scientific proof of any final proposition, but it would be enlightening, have weight and give this project the scholarly approach of disciplines outside of the legal system.

If the Conference Committee, Judge Willis or counsel of the case feel this should be put in the form of a formal motion, that will be done. I use the device of this letter only to avoid formalities and because time will be a factor in setting up the project if approved.

Thank you for your consideration.

Respectfully,

/s/ RICHARD C. McFARLAIN
Richard C. McFarlain

RCM:jg

cc: Justice Alan C. Sunberg

NOTE: Please see attached list of recipients of carbon copy.

(List of recipients of copy of letter omitted)

UNIVERSITY OF MIAMI
CORAL GABLES, FLORIDA 33124

SCHOOL OF EDUCATION
P.O. BOX 248065

May 27, 1979

Mr. Joel Hirschhorn
Hirschhorn & Freeman
742 N.W. 12th Avenue
Miami, Fla. 33136

Dear Mr. Hirschhorn:

Thank you for your letter of May 21 regarding your temporary postponement of your suit against cameras in the

courtroom. Enclosed is a bill for $665.70 to cover services and expenses in the analysis of the OSCA and the UCF research reports.

I made a thorough review of every aspect of the two studies and found a sufficient number of departures from minimal research requirements to suggest the need for considerable caution in the interpretation of their results. On the other hand, the UCF study — which is the better of the two, although certainly not free from "bugs" — does lend support to your position in "challenging the advisability. . . ." of using cameras in the courtroom. The data of the OSCA study, although not synthesized into a formal conclusion, would probably also support your position. I would be glad to go over my analysis with you at your convenience.

I enjoyed working on the project. It took me out of the usual "behavioral" research format. Although I have taught (statistics to) graduate students in criminal justice, this was my first look at what is obviously a most significant problem in the nation's justice system. I look forward to continuing with the project when you resume operations.

Cordially,

/s/ George J. Mouly
George J. Mouly.

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

NO. 77-25123A

THE STATE OF FLORIDA,

Plaintiff,

-vs-

RONNEY A. ZAMORA,

Defendant.

EXCERPT OF PROCEEDING, OCTOBER 4, 1977

* * * * *

THE COURT: You may be seated. Ladies and gentlemen, at this time, we're going to recess for the day. I'm not going to hold you back there any longer.

Let me say that I have received the request of the jury that they be allowed to watch themselves on television with the sound turned off, just to see what you look like.

I can't permit that during the course of the trial, but I will arrange for it after the trial. You will all get to see yourselves on television.

With that assurance from the Court, have a pleasant evening. Court will reconvene at 10:00 a.m. Court stands in recess.

WHR INVESTIGATIONS, INC.
1600 N.W. North River Drive • Suite 100
Miami, Florida 33125 • (305) 324-6982

William H. Riley

Mailing Address:
P.O. Box 160868
Miami, Florida 33116

WHR #80-296

April 29, 1980

Mr. Joel Hirschhorn
742 Northwest 12 Avenue
Miami, Florida

Dear Joel:

On April 24, 1980, at your request, at the conclusion of the trial for the day in the State of Florida vs. Johnny L. Jones being heard before Judge Thomas Scott I took an incident-light meter reading.

The reading was taken from inside the jury box prior to the lights being turned off in the Courtroom.

The light reading at this time was 730 foot candles.

A reading was then taken from inside the jury box inside of Judge Gordon's Courtroom. The lights were on in the courtroom. The light reading was 260 foot candles.

This is an approximate ratio of 2 to 1 of more foot candle brightness.

An incident light meter measures the light incident upon a subject. Incident light meters are the preferred choice among commercial photographers and motion picture cameramen for measuring light.

Lastly, I would note that a foot candle is a unit of illumination equivalent to that produced by a standard candle at a distance of one foot.

Sincerely,

/s/ BILL
William H. Riley

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

NO. 80-3039B

EXCERPT
April 21, 1980

STATE OF FLORIDA,

Plaintiff,

-vs-

JOHNNY L. JONES,

Defendant.

* * * * *

[Assistant State Attorney] DEPOSGAY: This is also being televised, and this is also going into the news media, and I have repeatedly and did ask your Honor last time to order the television not to make comment on the strength or weakness of witnesses' testimony.

[Defense Attorney] McGUIRK: I don't want my arguments publicized, your Honor, that I have pending

before the Court. Would your Honor — frankly, I think Mr. DePozgay's objection is well taken, and one of our Motions addresses that precise issue.

. . . We would ask leave, of course in the event your Honor decides to proceed with the trial of this case today — we would ask leave of Court to have a photographer for the defense come into the courtroom and take pictures in this courtroom and in the hallway outside for the purpose of demonstrating in the Record the nature of the — well, for example, there are special lights, lighting, and spotlights. There are cameras in the courtroom. I noticed during a Hearing this past week there was a still photographer who was taking pictures in the courtroom and we simply ask leave of Court to take pictures so we may have a photographic record of the atompshere [sic] in the courtroom and in the hallway outside.

[Assistant State Attorney] RICHEY: Judge, we would ask that when the jury does come in that these lights could be turned down so they're not right in their eyes, if the lights could be dimmed during the voir dire, perhaps not during the trial — if that is acceptable to the Court.

* * * * *

[Assistant State Attorney] LOWEY: . . . we do think the lights could be dimmed. They are shining in our eyes, which is disconcerting us. I don't know what the jury situation would be. It is directed at our table and not the jury box.

* * * * *